Supreme Court, U.S.
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No. 96-____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

PHILIP JAY FETNER,
Petitioner,

v.

STEWART H. HAGGERTY *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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April 28, 1997

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QUESTIONS PRESENTED

1. Whether, in a contested involuntary bankruptcy petition, the adjudication of purely private rights, in true adversary proceedings, mandates the constitutional protection of Article III and the Seventh Amendment, following *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

2. Whether a sham involuntary bankruptcy petition originally filed in bad faith by petitioners whose claims were knowingly subject to *bona fide* dispute can be subsequently cured by adding an intervening petitioner.

3. Whether a bankruptcy court may ignore a specific and limited remand and depart entirely from the law of the case to cure a perceived error in the original proceedings, raised *sua sponte* by that court during remand proceedings, thereby rendering the remand a nullity and rewriting statutory bankruptcy provisions.

4. Whether the alleged debtor's (petitioner here) fundamental rights to due process were violated by an egregious abuse of discretion, when the bankruptcy court applied the ultimate sanction of default (bankruptcy) as a procedural remedy.

5. Whether, as required by the Bankruptcy Code since 1984, "equity insolvency" was proved in the involuntary context, when no evidence was presented as to the alleged debtor's overall financial condition ("totality of the circumstances") or to the failure to pay any *bona fide* creditors beyond the actual petitioning creditors.

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner in this case is an individual currently residing in the Commonwealth of Virginia.

Respondents are

Stewart H. Haggerty
Johnson & Hardin Co.
Claus Peter Arndt
(*original involuntary petitioners*)
and
George Schwelling
(*intervening petitioner*)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Philip Jay Fetner respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1a) is reported at 99 F.3d 1180 (D.C. Cir. 1996). The opinion of the District Court (App. 5a) is not reported. The remand order of the District Court (App. 43a) is not reported. The several decisions and orders of the Bankruptcy Court (App. *passim*) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 12, 1996 (App. 1a). A timely Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on January 28, 1997 (App. 3a, 4a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Pursuant to Rule 29.4(b), petitioner hereby certifies that 28 U.S.C. § 2403(a) may apply; petitioner is, *inter alia*, challenging the constitutionality of 11 U.S.C. § 303 (involuntary bankruptcy). A copy of this petition is being served on the Solicitor General of the United States, Room 5614, Department of Justice, 10th St. and Constitution Ave., N.W., Washington, D.C. 20530. Petitioner received no notice whether the Court of Appeals pursuant to 28 U.S.C. § 2403(a) certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question. Before the Court of Appeals, petitioner (then appellant) made the appropriate F.R.A.P. 44 statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment provides in pertinent part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .

U.S. Const. amend. VII.

The Bankruptcy Code § 303 and Bankruptcy Rule 7016 are reproduced in the Appendix (pp. 50a, 53a). Bankruptcy Rule 1003(b) reads as follows:

> (b) **Joinder of Petitioners After Filing.** If the answer to an involuntary petition filed by fewer than three creditors avers the existence of 12 or more creditors, the debtor shall file with the answer a list of all creditors with their addresses, a brief state-

ment of the nature of their claims, and the amounts thereof. If it appears that there are 12 or more creditors as provided in § 303(b) of the Code, the court shall afford a reasonable opportunity for other creditors to join in the petition before a hearing is held thereon.

STATEMENT OF THE CASE

A. Nature of the Case.

On October 13, 1992, three alleged creditors filed an involuntary bankruptcy petition against petitioner (alleged debtor) in the U.S. Bankruptcy Court for the District of Columbia under Chapter 7. Petitioner defended on the grounds that the alleged creditors did not possess claims free from *bona fide* dispute, that the petition was filed in bad faith, that the creditors failed to prove that debtor was not generally paying his undisputed debts as due, and that the involuntary bankruptcy proceedings followed in this case were unconstitutional.

B. Course of the Proceedings and Disposition in the Bankruptcy Court and District Court.

After lengthy proceedings in 1992-93, including a trial on April 5, 1993, the Bankruptcy Court eventually dismissed the involuntary petition. Two petitioning creditors appealed. The District Court ordered a limited and specific remand to the Bankruptcy Court for certain further determinations. On the eve of a new trial to determine these issues, the Bankruptcy Court on August 5, 1994 granted the involuntary petition as a sanction for debtor not complying with an order of the court. Debtor appealed to the District Court, where jurisdiction was vested pursuant to 28 U.S.C. § 1334. On September 11, 1995, the District Court upheld the Bankruptcy Court. Debtor filed a timely appeal to the Court of Appeals pursuant to 28 U.S.C. §§ 1291 and 158(d). That court granted a stay of all further bankruptcy proceedings on May 24, 1996.

C. Statement of Facts and Proceedings Relevant to the Issues Presented for Review.

In order properly to frame the issues presented, it is necessary first to set forth the history of this matter in reasonable detail and second to begin well before the filing of the involuntary petition itself.

On July 2, 1991, future petitioning creditor Claus Peter Arndt ("Arndt") sued future alleged debtor Fetner in D.C. Superior Court on a personal promissory note. *Arndt v. Fetner,* 91-CA 8411. Arndt was represented by one D. Mitchell Basker ("Basker"). On three separate occasions in this litigation, before two different judges, Arndt filed a motion for "partial" summary judgment on the note itself, and each time, the court ruled against Arndt. Defendant Fetner meantime had filed substantial counterclaims, which survived motions to dismiss by plaintiff Arndt. Trial was set for the morning of October 15, 1992. Both parties submitted full pretrial statements.

Barely more than 24 hours prior to trial in the *Arndt* matter, to avoid a determination in D.C. Superior Court on the merits, Basker filed this involuntary bankruptcy petition under 11 U.S.C. § 303(b)(1). Mr. Basker claimed to represent three separate *bona fide* creditors of debtor: Arndt; a Dr. Haggerty and his wife, a Pennsylvania couple, who allegedly held a 1985 default judgment granted in Pennsylvania against debtor; and an Ohio company that allegedly held a default judgment granted in Ohio against debtor. The frantic haste in filing was evidenced by the misspelling of the names of both petitioners Haggerty and the Ohio company throughout the petition, their incorrect or incomplete addresses given, and the serious mischaracterization of the relationship between the Haggertys. Indeed, Basker was soon back before the Bankruptcy Court on October 23, 1992 "recanting" his prior *sworn* verification that he represented Mrs. Haggerty (who was, in fact, no longer married to Dr. Haggerty).

Debtor acting *pro se* immediately filed, on November 9, 1992, a motion to dismiss the petition for lack of jurisdiction and failure to state a claim upon which relief could be granted. Debtor asserted that the petition was filed in bad faith, for non-bankruptcy purposes and maliciously, and that none of the petitioners was a *bona fide* creditor. A hearing on the motion to dismiss was scheduled for January 27, 1993.

On December 21, 1992, at the urging of Basker, one George Schwelling sought to intervene to join the original petition. On January 19, 1993, debtor amended his motion to dismiss to include his opposition to Schwelling's alleged claim. This motion was formally granted on February 1, 1993.

The hearing on debtor's motion to dismiss was held on January 27, 1993. Debtor argued that the petitioners did not possess undisputed claims. After hearing argument by all the petitioning creditors, through counsel,[1] the court ruled that the factual disputes as to *bona fide* claims would have to be resolved at the trial of the involuntary petition. The Bankruptcy Court ordered debtor to answer the petition and set a trial for April 5, 1993. Debtor timely answered on February 11, 1993, denying the allegations of the alleged creditors, including the intervening petitioner Schwelling. Debtor also demanded a jury trial.

Just prior to trial, on March 16, 1993, petitioner Schwelling submitted a motion for summary judgment. Debtor filed a timely opposition. At the start of the trial, the court declared that the motion for summary judgment would be granted as unopposed. When debtor objected and produced a date-stamped copy of his opposition, the court after brief, cursory discussion ordered the motion for summary judgment granted.

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[1] Petitioners Haggerty and the Ohio company, Johnson & Hardin, have never appeared personally or testified at any hearing or in any other fashion in these proceedings.

The trial itself lasted the entire day. In a lengthy oral opinion, the court ruled that all three original petitioning creditors—the Ohio company, Dr. Haggerty, and Arndt—had presented *bona fide* claims and ordered that the involuntary petition be granted. No evidence was presented at trial by the petitioning creditors (i) on debtor's overall financial condition or (ii) that debtor was failing to pay his undisputed debts when due beyond the disputed jurisdictional claims. The court ruled that the evidence on the four petitioners' claims alone adequately supported a finding that debtor was generally not paying his undisputed debts as due.

Debtor on April 15, 1993 filed a timely motion to amend the judgment and grant a new trial. In response, the Bankruptcy Court rendered a supplemental decision on April 20, 1993, adding new grounds for the relief granted. Debtor filed a renewed and amended motion to reconsider on April 29, 1993. On May 18, 1993, the Bankruptcy Court admitted error, reversed its prior decisions, and dismissed the petition (App. 44a). The court struck two claims, those of Arndt and the Ohio company, and stated that it was unnecessary to review the other claims because the failure of two claimants left the petition short of the requisite number of three *bona fide* petitioners—implying that it would have been prepared to revisit the other claims had it been necessary to do so. The court also vacated all prior finding made as to bad faith and invited debtor to file for appropriate costs and sanctions.

In the meantime, the court on April 19, 1993 ruled in favor of debtor's prior motion to strike large parts of the original petition as scandalous, impertinent, and irrelevant (the motion was filed on January 19, 1993).

Thereafter ensued a series of motions by the original petitioners to stay the order of May 18, 1993 for the purpose of securing additional petitioners. None came forward, and an appeal was eventually perfected, followed

by several motions seeking additional time to file appellants' brief.

The case had a somewhat tortuous path on appeal. Appellee-debtor was not made aware (through an error in the clerk's office) of the original District Court status call held on August 19, 1993, where Basker received his first extension of time. Appellee-debtor did not receive notices of subsequent extensions of time granted (nor the motions therefor) and was ignorant of when, if at all, appellants intended or were required to file their brief. The brief for appellants was finally filed in early October 1993, when debtor was travelling abroad. The brief was not served on debtor as required by the rules, and debtor did not actually receive the brief until the end of October. Debtor eventually filed a motion to enlarge the time for filing a reply brief for cause. Appellants' several delays had consumed nearly four months. Debtor filed only one request for an extension of time. A status call on the case was then scheduled for February 11, 1994, but inclement weather on that day closed the court. The status call was not rescheduled. Instead, while debtor's motion was pending and within three days of the aborted status call, the District Court (Judge Thomas Penfield Jackson) issued a brief order of remand (App. 43a):

> Upon consideration of appellant's [sic] brief, the failure of the appellee to file a reply brief, and the entire record herein, it appearing to the Court that the Ohio state court judgment in favor of Johnson & Harding is not subject to *bona fide* dispute, and further that the mere assertion of a counterclaim by the debtor does not raise a *bona fide* dispute, it is this 14th day of February, 1994,
>
> ORDERED, that the appeal is granted; and it is
>
> FURTHER ORDERED, that this case is remanded to the bankruptcy court for determination as to whether the debtor's legal position in this litigation is taken in good faith, and not for purposes of

> delay, and that his counterclaim has genuine and objectively determinable merits, failing which the involuntary bankruptcy petition shall be reinstated.

Debtor filed a lengthy motion to reconsider, which motion was rejected. Debtor could not appeal the remand order because it was not a "final order." The Bankruptcy Court at a status hearing held on March 22, 1994 candidly noted that it did not understand the remand order, particularly the reference to debtor's "good faith," and asked all the parties to submit briefs suggesting the appropriate scope of remand by April 12, 1994. A pretrial conference was scheduled for June 7, 1994, with trial to follow on June 21, 1994. The court promised that it would issue an order defining the scope of the remand trial soon after submission of the briefs.

All parties submitted their briefs concerning the scope of remand on April 12, 1994. The petitioning creditors argued that a trial was unnecessary—indeed, that the remand itself was unnecessary—because the District Court had approved the Ohio company's claim and then failed to notice that the jurisdictional requirement of three *bona fide* petitioners was thereby satisfied. Debtor argued that an interpretation that purported to render the remand a nullity, that proceeded on the *assumption* that the District Court did not know the law (or how to count) was not a logical or preferred starting point. While admitting that the remand order was not a model of clarity—and the order gave no reasons or substantive evaluation for its remand—debtor suggested that the logic and grammatical construction of the order was to retry both the Ohio claim (specifically, the "good faith" position of debtor's assertions with respect thereto) and the Arndt claim (specifically, the *bona fide* assertion of debtor's counterclaims in that litigation). Alternatively, debtor suggested that the District Court may have been relying upon settled bankruptcy precedent that a deficient petition originally filed in

bad faith could not be cured by subsequent intervening petitioners. Thus, a finding for debtor on the Arndt claim alone could still require dismissal of the petition.

The Bankruptcy Court did not, however, respond to the parties' briefs. At the pretial conference held on June 7, 1994, the issue of the scope of the remand was argued *de novo*. The court offered no guidance but promised in the resulting pretrial order "shortly" to issue an order defining the issues for trial and set a new trial date for August 24, 1994. On June 16, 1994, the court *sua sponte* issued an order instructing debtor to file a comprehensive list of all his creditors and the amounts of all claims against him, whether or not contingent or subject to *bona fide* dispute (App. 41a). Debtor did not receive the order, totally unanticipated, until the end of June 1994. Extensive litigation in another forum, a pending move of residence, and a national holiday period (and absence) prevented an immediate response. Debtor was preparing a proper motion to reconsider when the court quickly issued an order to show cause on July 8, 1994. Debtor filed a timely response to that order on July 15, 1994, in the form of a motion to reconsider the order of June 16, 1994 and a response to the order to show cause.

On August 5, 1994, the Bankruptcy Court issued two relevant decisions: (i) a decision denying debtor's motion for reconsideration and granting, as a sanction, the involuntary petition pursuant to 11 U.S.C. § 303(b)(2) (App. 12a); and (ii) a "supplemental decision" (a) deciding that the Haggerty claim should be revisited at trial, (b) finding that debtor's *Arndt* counterclaims were, in fact, *bona fide* and had objectively determinable merits, (c) finding that debtor acted in good faith, and (d) indicating that the bad faith issue of petitioner Arndt would be alive in some guise had the court not granted the involuntary petition under § 303(b)(2) (App. 22a).

Thus, on the *sole* issues directed by the District Court on remand, the Bankruptcy Court found entirely for debtor. And in reopening the Haggerty claim, the Bankruptcy Court completed its own reversal of each of the three original claims once granted as qualifying. Nevertheless, as a sanction for not complying strictly with the court's order of June 16, 1994, the Bankruptcy Court declared debtor bankrupt under Chapter 7.

Debtor filed a timely notice of appeal. On September 11, 1995, the District Court (Judge Aubrey E. Robinson, Jr.) refused to consider the jurisdictional, bankruptcy code or constitutional issues raised by debtor and, ruling solely on the Bankruptcy Court's sanction of August 5, 1994, found that the court had not abused its discretion (App. 5a). Debtor appealed to the Court of Appeals on October 12, 1995.

D. The Decision of the Court of Appeals.

Before the Court of Appeals was the now "final" remand order issued by District Court Judge Jackson, the order affirming the judgment of the Bankruptcy Court issued by District Court Judge Robinson, and all the appropriate rulings of the Bankruptcy Court. Initially, the Court of Appeals denied a motion for summary affirmance filed by the original jurisdictional creditors, noting the pendency of all the issues raised by debtor, and granted debtor a stay of all bankruptcy proceedings. Briefs were filed, and oral argument was set but then cancelled. On November 12, 1996, the Court of Appeals in a *per curiam* opinion (Judges Edwards, Silverman, and Henderson) affirmed "the judgment of the district court." Ignoring altogether that the involuntary petition was filed under Section 303 (b)(1), the court ruled that the Bankruptcy Court had not "abused its discretion" in granting the involuntary petition against debtor pursuant to Section 303(b)(2) . Moreover, the court also swept aside long-standing precedent and

authoritative commentary that a bad-faith petition could not be subsequently cured, noting that "[o]ther methods exist for addressing bad actors" without "punishing" an intervening creditor (in the court's words, a "properly joined creditor"). Finally, the court surprisingly held that the statutory requirement of a finding that "Fetner generally failed to pay his debts as they became due" was properly enforced.

The Court of Appeals did not address debtor's constitutional argument with respect to a jury trial, did not speak to debtor's contention that the Bankruptcy Court impermissibly departed from the original remand, and did not mention petitioner's due process argument with respect to applying a default and hence bankruptcy as a procedural sanction.

REASONS FOR GRANTING THE PETITION

The proceedings and outcome of this case have been a terrible injustice of truly Kafkaesque dimensions to petitioner. A sham involuntary petition filed for the worst motives succeeds as a punishment not remotely authorized under the federal Bankruptcy Code. But for the purposes of certiorari, petitioner urges the importance of the legal errors beyond the particular facts and parties of the case. Significant policy matters concerning important federal questions as well as stark conflicts between this circuit, on the one hand, and the remaining circuits, on the other hand, demand the attention of the Court. And the Court also has an opportunity to clarify its own decisions, at this point irreconcilable with the decision of the Court of Appeals.

Petitioner is, moreover, acutely aware of the risky perception perhaps created when a *pro se* party puts before this Court several alleged important errors meriting the grant of this writ. Nevertheless, there are at least five compelling reasons for overturning the result reached by the Court of Appeals here.

I. THE INVOLUNTARY BANKRUPTCY SECTION OF THE BANKRUPTCY CODE RESULTS IN THE UNCONSTITUTIONAL DEPRIVATION OF THE SEVENTH AMENDMENT GUARANTEE OF A JURY TRIAL.

Unaccountably, the Court of Appeals simply did not address this question of unconstitutionality. Nor earlier did the District Court. Yet the challenge is unavoidable. Involuntary bankruptcy is, admittedly, a tiny portion of bankruptcy practice, but the fact is that in absolute terms enough involuntary cases are filed each year to make the deprivation of jury trials a startling feature of the judicial landscape.

There is no doubt that recent Supreme Court cases have caused uncertainty as to the status of jury trials in the bankruptcy courts. While the seminal *Granfinanciera* case[2] left unresolved certain basic issues (whether and when bankruptcy courts *may* conduct jury trials), its application to this litigation would seem relatively straightforward. Congress lacks the power to strip a party of the right to a jury trial under the Seventh Amendment when private rights are adjudicated; Congress may, however, provide for non-Article III adjudication without juries so long as "public rights" are litigated. While Justice Scalia's opinion that "public rights" must always involve the government has not carried the day, the majority on the Court have strictly construed the category of "public rights" that may be analogous to private rights but are so intertwined with a federal regulatory program that the Seventh Amendment does not apply. The Court has *not* so blessed the entire bankruptcy statutory scheme.[3] Indeed, the teach-

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[2] *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 109 S.Ct. 2782 (1989).

[3] There are points in *Granfinanciera* where the Court suggests that the restructuring of debtor-creditor relations central to the bankruptcy scheme is, in fact, not a "public right." *See, e.g.*, 109 S.Ct. at 2792 n.11. *But cf.*, 109 S.Ct. at 2798 n.12. *See also* Justice White's dissent at 109 S.Ct. at 2815-16.

ing of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), as carried forward in *Granfinanciera,* is that state-law causes of action for breach of contract are paradigmatic private rights, even when asserted in the midst of Chapter 11 reorganization proceedings. Moreover, the *Granfinanciera* majority's attempt to save *Katchen v. Landry,* 382 U.S. 323 (1966), by holding that the right to a jury trial there depended upon whether the creditor had previously submitted a claim against the bankruptcy estate, indicated that ordinarily private rights will not yield to a public-rights designation in the bankruptcy context absent *voluntary participation* by the adverse party. By definition, a debtor challenging an involuntary petition by adjudicating the *bona fide* status of state-law causes of action can never lose his right to a jury trial.

Debtor demanded a jury trial in the Bankruptcy Court. The court refused, relying upon statute and "core" designation, and later noted that because involuntary proceedings in the bankruptcy court were "equitable" in nature, no jury trial need be provided. That is Justice White's forum-driven view; it did not prevail in *Granfinanciera.*[4]

Debtor was thrust involuntarily into adversary proceedings and the adjudication of private legal rights at common law. None of the claims asserted could have been sustained in equity; adequate and complete remedies existed at law. Debtor's invocation of constitutional rights, such as due process, does not affect the underlying private nature of the jurisdictional claims.

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[4] Using the bankruptcy court simply as an alternative dispute-resolution forum may thus be more than classic bad-faith: without a jury trial, the attempt may well be unconstitutional. Even Justice White might agree here, because the issues are jurisdictional in nature and the bankruptcy mechanism therefore not yet fully invoked. Arguably, until the bankruptcy court has actual or constructive possession of the bankruptcy estate, no public right is created.

The possible added expense, delay, or inconvenience of jury trials in the bankruptcy context specifically did not impress the *Granfinanciera* court.

One might attempt to argue that the "right" to invoke involuntary bankruptcy is precisely the sort of statutory cause of action that Congress may commit for adjudication to a non-Article III tribunal, but a scheme that relies upon the *determination* of wholly private tort, contract, or property cases can never pass constitutional muster, absent voluntary participation. In this litigation, the Bankruptcy Court in effect initially constituted itself as a court of original and competent jurisdiction in Ohio, Pennsylvania, and Washington, D.C. The necessity for a jury trial, if demanded, is unavoidable.[5]

II. THE COURT OF APPEALS DECISION WITH RESPECT TO A BAD FAITH FILING PUTS THIS CIRCUIT SQUARELY AT ODDS WITH ALL OTHER CIRCUITS THAT HAVE DECIDED THIS ISSUE; THE NECESSITY OF DISMISSING BAD FAITH FILINGS IS ESSENTIAL TO PRESERVE BANKRUPTCY PURPOSES AND HENCE THE INTEGRITY OF THE BANKRUPTCY SYSTEM.

Under existing, long-standing precedent, the manifest bad faith of the original claimant Arndt and his counsel—

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[5] *See also, In re Ben Cooper*, 896 F.2d 1394 (2nd Cir. 1990), *vacated* and *remanded*, 111 S.Ct. 425 (1990), *reinstated*, 924 F.2d 36 (2nd Cir. 1991), *cert. denied*, 111 S.Ct. 2041 (1991), and the following illuminating recent law review articles: Baird, *The Seventh Amendment and Jury Trials in Bankruptcy*, 8 Sup. Ct. Rev. 261 (1989); Sabino, *Jury Trials, Bankruptcy Judges, and Article III: The Constitutional Crisis of The Bankruptcy Court*, 21 Seton Hall L. Rev. 258 (1991); Note, *Article III and Jury Trials in Bankruptcy*, 22 Memphis St. U. L. Rev. 571 (1992); Note, *Jury Trial in Bankruptcy Court: Are There Any Constitutional, Statutory or Practical Limitations?*, 5 J. of Legal Comm. 289 (1990); and Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 Minn. L. Rev. 967 (1988).

counsel for all the original petitioners—foreclosed the addition of intervening petitioners for jurisdictional purposes and mandated dismissal of this petition.

The courts have applied different legal tests to determine whether an alleged creditor acted in bad faith initiating an involuntary petition. Some courts have used an "objective" test related principally to determining whether or not a non-bankruptcy purpose, including the use of the Code as a substitute for customary state collection procedures, was the primary motivation, as measured by "what a reasonable person would have believed." [6] Another line of authority looks at the creditor's motives and conduct, in the sense of malice, ill-will, or spite shown in a desire to embarrass or harm the debtor, the so-called "subjective test." [7] Still other courts have sought to combine both approaches and use a two-part test.[8] Some courts have sought best to give effect to the two-part approach by adopting the standard of Rule 11, which re-

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[6] *In re Grecian Heights Owners' Ass'n.*, 27 B.R. 172, 173-4 (B. Ct. D. Ore. 1982) ("The damage to a debtor from the filing of an unfounded involuntary petition is the same whether it was filed by a reasonable person acting in bad faith or by one who is so unreasonable that he proceeds in disregard of [the fact] that his proposed course of action is without merit"), *followed* in *In re Wavelength*, 61 B.R. 614, 620 (9th Cir. 1986).

[7] *See, e.g., Basin Elec. Power Coop. v. Midwest Processing Corp.*, 47 B.R. 903, 909 (B. Ct. D. N.D. 1984), *aff'd*, 769 F.2d 483 (8th Cir. 1985), *cert. den.*, 474 U.S. 1083 (1986) ("Considering subjective motivations of petitioning creditors is analogous to considering possible ulterior motives of petitioning debtors in voluntary bankruptcy proceedings. It has long been recognized that using the Bankruptcy process to promote individual interest in a manner not consistent with the legislative purpose of the bankruptcy code is an abuse of jurisdiction of the bankruptcy courts." (citations omitted)).

[8] *See, e.g., U.S. Fidelity & Guar. Co. v. DJF Realty & Supplies*, 58 B.R. 1008, 1011 (B. Ct. N.D. N.Y. 1986) ("This Court agrees that the better practice is . . . to inquire into *both* the creditor's conduct as well as into its motives for filing the petition.").

quires a certification both as to a reasonable belief *and* the absence of any improper motives.[9]

By any measure, the original petition here was filed in bad faith. There can be little doubt, objectively, that petitioner Arndt's attorney filed as an eleventh-hour ploy to avoid a trial imminent in D.C. Superior Court. This Court should ask itself why a prudent creditor would not wait two days to obtain a judgment, thereby going a long way to remove any doubts as to the validity of his claim, before filing such bankruptcy proceedings. Furthermore, the findings of the Bankruptcy Court were that Arndt's counsel filed the petition without reasonable or adequate investigation of the Haggerty or Johnson & Hardin claims, both as to the relevant facts and the law.

This Court should recognize that creditors of an *individual* debtor as a practical matter rarely have anything to gain from the commencement of an involuntary bankruptcy case. Creditors simply have little rational (economic) reason, absent extraordinary circumstances (no evidence of which was presented here), to thrust an individual into bankruptcy, given the Code's policy of providing individuals with a "fresh start." A fair reading of the record here as a whole thus leads inescapably to a finding of bad faith as a subjective matter. Debtor cannot here lay out the record in excruciating detail, but debtor's *first* contact with petitioner's counsel was an abusive telephone call in early June 1991, in which counsel accused

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[9] *See, e.g., In re Fox Island Square Partnership*, 106 B.R. 962 (B. Ct. N.D. Ill. 1989). *Fox Island* is very similar to this case. An involuntary petition was filed to delay a state court proceeding just seven days before trial. The court there emphasized critically the proximity to trial. Petitioner there, the court said, could not have believed in good faith that the involuntary petition stated a claim for relief because Section 303(b)(1) requires that the debts upon which the petition is based be undisputed. Petitioners were "well aware" that the alleged debt was "highly disputed" in view of the counterclaims present. And a motion for summary judgment had also been denied in state court.

debtor of being a con man and threatened debtor with physical violence and unconscionable collection activity. Matters went from bad to worse thereafter. Counsel proceeded for several days to "auction" debtor's personal promissory note in front of debtor's private club located in Washington, D.C. and has engaged in a relentless, concerted campaign of harassment, intimidation and defamation ever since. Debtor was forced to file a grievance with the local bar counsel.

The Bankruptcy Court found at trial inescapable evidence of "intense animosity" towards debtor by Arndt and "more particularly Mr. Arndt's counsel". Indeed, the pleadings filed by the jurisdictional petitioners in this case reek of absolute malice. Debtor is referred to as a bully, legal terrorist, rogue attorney, con artist, a gigolo who fleeces women as a career, and a criminal who assaults individuals, commits perjury, and uses fictitious social security numbers to gain credit. None of these allegations has anything to do with the grounds for filing or maintaining an involuntary bankruptcy petition. In fact, these papers go far beyond the acceptable bounds of advocacy. Indeed, the court below eventually granted debtor's motion to strike whole *paragraphs* of the original petition. Successful motions to strike are unusual, but a more startling example of impertinent irrelevance could hardly be imagined. The inclusion of such matter is a strong sign that an improper purpose underlies the pleading itself. Petitioner Arndt's counsel before the filing of the petition, after filing the petition, and even after the dismissal of the petition sought out others to join the petition to shore up known deficiencies. The scurrilous legal papers were, in fact, widely circulated. The extreme ill-will evidenced here places the failure of counsel to satisfy the most elemental requirements of reasonable advance inquiry in the proper context.

Indeed, the Court of Appeals apparently agreed with the finding of bad faith but nevertheless swept aside the

leading modern cases—in fact, never mentioning all this precedent. Worse, the court ignored the very authority that it used in another context. The panel in its first paragraph cites as authority *In re Coppertone Communications, Inc.*, 96 B.R. 233 (B. Ct. W.D. Mo. 1989). Apparently, the panel liked some of *Coppertone* but not all; on the issue of bad faith, the *Coppertone* court said:

> Courts have consistently held that an essential prerequisite for allowing additional creditors to join to cure a defective petition is that the original petition was filed in good faith . . . This Court is bound by and will follow [*Basin Elec. Power Coop. v. Midwest Processing Corp.* [10]]

96 B.R. at 236.

The Court of Appeals reasoned that "[o]ther methods exist for addressing bad actors without punishing properly joined creditors." But the mere existence of some regulatory provisions (including a form of Rule 11—hardly the panacea indicated by the Court of Appeals) dealing with "bad actors" does not preempt judicial continuation of a long history of good faith requirements. Such a decision, if left undisturbed, will jeopardize the equitable efficacy of the bankruptcy system. At a time when that system is under the severe stress of an increasingly heavy caseload exploding throughout the country, it is imperative that the jurisdiction of bankruptcy courts not be abused or invoked for nonbankruptcy purposes. Congress never intended that bankruptcy courts be thrown into the creative mix of forum shopping for aggressive collection of private, state-originated debts. Or the coercion of disputed debts. Reliance upon the remedy of Rule 11 is frequently

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[10] 47 B.R. 903 (B. Ct. N.D. 1984), *aff'd*, 769 F.2d 483 (8th Cir. 1985), *cert. den.*, 474 U.S. 1083 (1986). Cited approvingly by a hundred courts and commentators, *Basin* is, perhaps, the leading modern case on bad faith, but *Basin* itself was based on a long line of cases and the universal principle that petitioners in equity must come forward with clean hands.

a chimera and with all its satellite litigation hardly helps the caseload. Certainly, it is intolerable that the federal Bankruptcy Code is being administered differently in this circuit from other parts of the country. Ensuring uniformity is a proper function of this Court.

The panel cites and lifts most of its operative language directly from *In re Kidwell,* 158 B.R. 203 (B. Ct. E.D. Calif. 1993). But this quixotic tour de force by a California bankruptcy judge admits that it flies squarely in the face of *Basin et al.,* for which he wishes a "decent burial" (158 B.R. at 220). The *Kidwell* opinion is lamentably short on history[11] and mischaracterizes the good faith doctrine, never "dormant" and hardly "exhumed" by the 8th Circuit. Good faith permeates nearly every aspect of the voluntary bankruptcy process. But the judge can perhaps be forgiven his hyperbole and gymnastics when the facts of that case are understood. In *Kidwell, six* intervening creditors, all possessing good claims, existed —more than enough to start their own petition, twice! Indeed, again and again, the *Kidwell* court emphasized the futility of requiring these creditors to 'go elsewhere'. Thus, that court referred to the involuntary bankruptcy before it as "deserved" and "inevitable," language unfortunately uncritically adopted by the panel here. There has never been anything "inevitable" about *this* involuntary petition, and using the *Kidwell* language in this context is disturbing. In four years of Herculean efforts to find intervening creditors, one, Schwelling, has come for-

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[11] Equitable jurisdiction has always relied upon the bankruptcy court's use of its equitable power to protect the bankruptcy process from misuse. From the *first days* of bankruptcy's use in this country, the courts have found it necessary to protect the process from being "perverted to other than its legitimate purposes." F. Hillard, A Treatise on the Law of Bankruptcy and Insolvency 5 (3rd Ed. 1872).

ward. In fact, *Kidwell*'s unique facts hardly invite broad precedential application.[12]

III. THE COURT OF APPEALS DECISION IS INCONSISTENT WITH THE FUNDAMENTAL PRINCIPLE OF DUE PROCESS THAT A LOWER COURT ON REMAND STAY WITHIN THE FOUR CORNERS OF THE REMAND.

The District Court in February 1994 instructed the Bankruptcy Court to do two things: investigate debtor's good faith and determine whether the *Arndt* counterclaims previously filed by debtor had objectively determinable merits. This is the posture of the case if one accepts, *arguendo*, the correctness of the remand that set aside the *dismissal* of the petition by the Bankruptcy Court. Is this specific remand then to be ignored? Can the Bankruptcy Court go off, as it did here, on a frolic of its own? That court adopted, in fact, a posture completely at odds with the remand. Moreover, it actually decided *both* direct remand issues in favor of debtor: debtor was found to be acting in full good faith, and the *Arndt* counterclaims were determined to be objectively valid and a complete offset (*See* App. 22a *et seq.*).[13]

It is the duty of the trial court, *on remand*, to comply strictly with the mandate of the appellate court. *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304 (1948). Generally, the

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[12] Before this Court of Appeals decision, no case has cited *Kidwell* for its main proposition. The few cases that have referred to *Kidwell* for one of its dicta have specifically refused to remove the good faith filing requirement. *See, e.g., IBM Credit Corp. v. Compuhouse System, Inc.*, 179 B.R. 474 (B. Ct. W.D. Pa. 1995).

[13] The ultimate irony—or nightmare, from petitioner's perspective—is that had the Bankruptcy Court made its Haggerty determination earlier (at the time of dismissing the involuntary petition in May 1993), instead of during the remand proceedings, there likely would have been no remand from the District Court; *i.e.*, no chance for three jurisdictional creditors would have existed.

trial court has no authority to retry any issue that the appellate court *ought* to have considered (but did not) or to admit new evidence in conflict with the judgment of the reviewing court. Obviously, a different procedure would reek havoc with the administration of justice, introduce disorganization and confusion, and, not incidentally, threaten the due process rights of the parties. *See, Federal Communication Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Nor can the lower court alter or modify its own original judgment where untouched by the remand mandate.

The Bankruptcy Court by its order of June 16, 1994 effectively reopened the case and started anew, and its opinion of August 5, 1994 justifying the imposition of the sanction clearly professed to reopening a matter that existed at the time of the original dismissal. And logically, if the Bankruptcy Court is correct about the burden of proof, the opposite view was a part of the judgment of the reviewing court. The order of June 16, 1994 is clearly inconsistent with the decision of the District Court. The remand makes sense only if the law of the case is that three original jurisdictional creditors were required. Nor did the Bankruptcy Court make any attempt to reconcile reopening the question of twelve creditors with the mandate of or the views expressed by the reviewing court. Indeed, the Bankruptcy Court admits that it was attempting to correct an "error" that *it* made at the original trial.

The Court of Appeals does not specifically address the remand but implicitly condones the walkabout by itself approving the Bankruptcy Court's subsequent rewriting of the Bankruptcy Code and Rules. Bankruptcy Rule 1003(b) provides that when *less than three* petitioners file an involuntary petition under Section 303(b)(2), *if* the alleged debtor puts in issue the number of his creditors to require at least three petitioners, debtor must do so by filing a list of his creditors. But this instant petition was

filed under Section 303(b)(1). The Bankruptcy Rules say nothing to the effect that when three creditors file *and allege* twelve or more creditors, as here, the debtor must step forward to show that he has twelve creditors before he can challenge the bona fides of existing petitioners. And what a remarkable proposition: debtor is, apparently, supposed to correct or ignore the adversarial petition filed against him! The panel here makes a mockery of Rule 1003(b), which indeed makes no sense and serves no purpose if there is to be no functional difference between a 303(b)(1) and a 303(b)(2) filing.

The panel cites *Coppertone, op. cit.* That case simply relies on Rule 1003(b): "If, in its answer, the debtor puts in issue the number of creditors, then it must file with its answer a list of all creditors . . ." (96 B.R. at 234). *Coppertone* has no direct relevance to our facts. *Coppertone* does not help the panel to its conclusion; the panel does not explain how and why a court can thus change the statutory scheme established by Congress. *No* case supports the panel's determination that a debtor notwithstanding the actual petition filed against him must affirmatively prove the basis for triggering the 'jurisdictional' requirements set forth in Section 303(b)(1); and the determination is especially troubling because it altogether ignores the leading authority on this subject—*Atlas Mach. Iron Works v. Bethlehem Steel,* 986 F.2d 709 (4th Cir. 1993)—which stands squarely against the panel's decision. Once again, this circuit is creating its own Bankruptcy Code, in direct conflict with decisions by other courts of appeals, thereby threatening to disrupt a uniform federal bankruptcy system.

And again, the due process implications of the panel's opinion are staggering; the subject of the number of creditors was raised and dealt with during the January 27, 1993 hearing to dismiss the petition, never raised by any party or the court at trial, never raised on the first

appeal (in briefs or by the court), and not brought up post-remand in any pleading or at the new pre-trial conference.

IV. AN EGREGIOUS ABUSE OF DISCRETION SHOULD ALWAYS BE CORRECTED UNDER APPELLATE REVIEW; THE BANKRUPTCY COURT ABUSED ITS DISCRETION WHEN IT ORDERED A DEFAULT JUDGMENT AGAINST DEBTOR AS A SANCTION FOR FAILING TO COMPLY STRICTLY WITH THE COURT'S ORDER OF JUNE 16, 1994.

It is clear from the literature and cases that there is no single standard of "abuse of discretion" and that the phrase means widely different appellate deference depending upon the context.[14] The appellate courts require measured deference when the trial court clearly engaged in balancing *all* the relevant public and private interests and where the balancing appears reasonable. The cases seem to imply more appellate leeway over a trial judge's managerial choices than used in reviewing a trier of fact. When sanctions are involved and especially as the sanctions increase, appellate review increases. The standard does not involve finding a wholly unreasonable or whimsical choice, but something more than mere error is required. Error that rises to an injustice, a choice that contains a material error of law, or an extraordinary remedy that amounts to "overkill"—all qualify as abuses of discretion in most contexts. An appellate court may also assert greater latitude in equity or quasi-equity settings.

The Bankruptcy Court abused its discretion on August 5, 1994, by choosing the most draconian remedy without

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[14] *See generally*, Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747 (1982); Rosenberg, *Judicial Discretion of Trial Court, Viewed from Above*, 22 Syracuse L.J. 635 (1971); and Childress, *A Standard of Review Primer: Federal Civil Appeals*, 125 F.R.D. 319 (1989).

engaging whatsoever in the necessary and relevant balancing of interests required. This litigation had gone on for nearly two years by August 1994. There is not a *single* instance of debtor having failed to respond to a bankruptcy court order or meet a deadline prior to the order in question here.

At a time when the parties were awaiting clarification of the scope of trial, consistent with the remand order, the Bankruptcy Court raised an entirely new issue. Debtor believed that the issue was improperly raised and determined to file a motion for reconsideration. For trying personal reasons—given in outline to the court—debtor's motion to reconsider was not timely filed. Debtor has always admitted this deficiency. But given the additional issue raised by the following order to show cause and *pro se* debtor's not unreasonable decision to respond to both orders at once, the real delay notwithstanding some unfortunate rhetoric (and math) by the court amounted to a mere seven days. The motion to reconsider and response to the order to show cause was, in fact, filed well within the time allowed by the order to show cause. To conclude that debtor was thereby acting in some offensive, contumacious, or obstructionist fashion just ignores the specific context and the two-year history of this matter. Most cases upholding such a sanction involve *protracted* egregious and dilatory conduct, not a single, isolated failure to meet a deadline.[15]

It is important to be clear as to any question that debtor was acting cavalierly or that he was, in fact, refus-

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[15] *See, e.g., Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334 (9th Cir. 1985) (a single willful violation did not justify a default sanction in view of extensive compliance elsewhere). *See also* the conduct reviewed at length in *Trakas v. Quality Brands, Inc.*, 759 F.2d 185 (D.C. Cir. 1985) and *Camps v. C & P Telephone Co.*, 692 F.2d 120, 123 (D.C. Cir. 1981) ("a single act of misconduct seldom if ever can justify dismissal.").

ing to obey an order for any reason. Debtor filed a motion for reconsideration. The issues presented were not frivolous but went to the heart of what the remand was all about and how debtor could preserve his status (and privacy) prior to an actual finding of bankruptcy (unlikely, in his view). Moreover, debtor offered *in camera* inspection of the requested list of creditors, which offer the court rightly construed as, in part, a request for an extension of time to comply with the original order. Thus, debtor was seeking reconsideration, guidance, clarification, and a reasonable alternative. The Bankruptcy Court sanctioned debtor simply for filing his papers late.

It is important as well to stress that the Bankruptcy Court's decision does not involve a lesser sanction. This decision imposes the most draconian sanction possible under the circumstances. And debtor thereby was denied his right to a trial on the merits. Time and again, the courts throughout this country have emphasized that dismissal as a sanction is an extremely harsh remedy, a sanction of last resort to be applied only after lesser sanctions have been explored without success. This Court should restore the Court of Appeals to its own proper standard:

> The law of this circuit partakes of the general view that dismissal is an extremely harsh sanction . . . Since our system favors the disposition of cases on the merits, dismissal is a sanction of last resort to be applied only after less dire alternatives have been explored without success. [citation omitted]

Trakas v. Quality Brands, Inc., 759 F.2d 185, 186-87 (D.C. Cir. 1985). Indeed, this circuit has ruled that only a "slight abuse of discretion" is "sufficient to justify a reversal" of an order of default. *Bridoux v. Eastern Airlines, Inc.*, 214 F.2d 207, 210 (D.C. Cir. 1954). There is no *hint* whatsoever in the Bankruptcy Court's opinion of August 5, 1994 that it even contemplated a lesser sanction.

The lower court does *suggest* that debtor's brief delay appears to be a calculated tactical ploy designed to thwart petitioners' ability to add new petitioners prior to the established trial date (August 24, 1994). But a specific finding of fact, supported by the record, of genuine prejudice to the other side is nowhere to be found. And the bankruptcy rules do not, in fact, permit the addition of new petitioners to an involuntary petition after trial and on a limited remand, and no case has ever so held. *See, In re Nazarian,* 5 B.R. 279 n.10 (B. Ct. D. Md. 1980). The proper interpretation of Section 303(c) is that the time for additional creditors to join an involuntary petition passes when the case is originally tried. Thus, any so-called prejudice to the original petitioners is worse than speculative; it is entirely ephemeral.

In the face of an absence of the traditional criteria for approving such a severe sanction, the District Court in its opinion of September 11, 1995 made much of the decision in *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 113 S.Ct. 1489 (1993) and the standard of "excusable neglect" when applied to a motion to enlarge time to comply with an order. The entire analysis, almost mystifying in its essential irrelevancy, simply ignores the draconian *result* of the action taken by the Bankruptcy Court. The denial of a motion to enlarge time should not be converted to a default judgment without going considerably beyond *Pioneer's* more limited purposes.

Moreover, *an abuse of discretion always occurs when a court attempts to exercise a power that it does not legally possess.* The Bankruptcy Court in its decision of August 5, 1994 specifically states that it is imposing its sanction pursuant to Bankruptcy Rule 7016. That rule refers only to pretrial conferences, scheduling orders, and pretrial orders "reciting the actions taken" at pretrial conferences. By no stretch of the imagination can the order of June 16, 1994 be said to be a pretrial order. In fact, a pretrial order had already been issued on June 8, 1994, and the

order of June 16, 1994 concerned *nothing* discussed or contemplated at the pretrial conference held on June 7, 1994. Not surprisingly, the pretrial conference dealt solely with the remand mandate. Accordingly, the sanctions allowed in Rule 7016(f) do not apply to debtor's failure timely to file a challenge to the order of June 16, 1994. In these circumstances, Rule 7016 has no applicability whatsoever. This observation raises no mere technicality. Had the concerns underlying the order of June 16, 1994, as finally disclosed in the opinion of August 5, 1994, been raised and discussed at the pretrial conference held on June 7, 1994, the question of compliance—at least as it relates to a sanction—would never have arisen.

V. THE COURT OF APPEALS SHOULD HAVE DISMISSED THE INVOLUNTARY PETITION BECAUSE PETITIONERS PRODUCED AT TRIAL NO EVIDENCE THAT DEBTOR WAS GENERALLY NOT PAYING HIS UNDISPUTED DEBTS WHEN DUE.

Petitioners at trial offered *no* direct evidence on the question of debtor's general failure to pay his debts—a requirement of involuntary bankruptcy since 1984—beyond the jurisdictional creditors. Every single pertinent case holds that such a limited analysis of a debtor's overall financial condition is inadequate: so-called "equity insolvency" requires an analysis of "the totality of the circumstances."[16] Minimally, there must be evidence presented both as to the number and to the amount of all unpaid claims as of the filing of the petition and debtor's general financial condition. The nonpayment of any debts

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[16] *See, e.g., Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540 (10th Cir. 1988); *In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc.*, 779 F.2d 471 (9th Cir. 1985); and the excellent thumbnail survey in *In re Caucus Distribs., Inc.*, 18 C.B.C.2d 745, 757-8 (B. Ct. E.D. Va. 1988) ("courts generally require the creditors to proffer evidence relating to the overall financial structure of the alleged debtor."). *See also*, 2 King *et al.*, Collier Bankruptcy Manual 303.09 (15th ed. 1989).

must be put into a context and weighed accordingly. Petitioners introduced no such evidence, which strategy was their choice. The burden of proof rests squarely on petitioners. *See, In re SBA Factors of Miami, Inc.*, 13 B.R. 99 (B. Ct. S.D. Fla. 1981). The Bankruptcy Court apparently held that evidence with respect to debtor not paying the petitioners was sufficient.

This clear error was approved by the Court of Appeals. The panel simply cites *In re Concrete Pumping Service, Inc.*, 943 F.2d 627 (6th Cir. 1991). But that case also required an investigation into the totality of the circumstances. Here is what the *Concrete Pumping* court found:

> Concrete Pumping was in default on 100% of its outstanding debt to 100% of its creditors. It is impossible to get any more general than that.

943 F.2d at 630. The *Concrete Pumping* precedent cannot possibly justify the result in this matter. Indeed, the *Concrete Pumping* citation amounts to a flagrant disregard of the record in this matter and for settled statutory doctrine.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

P. JAY FETNER
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P.O. Box 1018
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April 28, 1997

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Decided November 12, 1996

No. 95-7244

PHILIP JAY FETNER,
Appellant

v.

STEWARD H. HAGGERTY, *et al.*,
Appellees

Appeal from the United States District Court
for the District of Columbia
(94cv2481)

Before: EDWARDS, *Chief Judge;* SILBERMAN and HENDERSON, *Circuit Judges.*

Opinion for the Court filed *Per Curiam.*

Per Curiam: The bankruptcy court did not abuse its discretion in reinstating the involuntary petition against Fetner pursuant to 11 U.S.C. § 303(b)(2). Fetner failed to provide the bankruptcy court with its requested list of 12 or more creditors, therefore only a single creditor's claim must be neither contingent as to liability nor subject to bona fide dispute. *See In re Coppertone Communications, Inc.*, 96 B.R. 233 (Bankr.W.D. Mo. 1989). We agree with the bankruptcy court's determination that, at

the very least, the Schwelling and Johnson & Harding claims were undisputed and noncontingent.

Fetner argues that we must ignore the claims of other creditors because Arndt petitioned for involuntary bankruptcy in bad faith. We disagree that a bad faith petition bars the joinder of valid claims. Other methods exist for addressing bad actors without punishing properly joined creditors. For instance, the bankruptcy code provides for damage awards, including punitives, against bad faith petitioners. 11 U.S.C. § 303(i)(2)(A) & (B). The court can even require a bond, after notice and a hearing, to indemnify the debtor for amounts that may be later allowed under § 303(i). 11 U.S.C. § 303(e). Since every bankruptcy petition must be signed to attest that the petition is—to the best of the signor's knowledge, information, and belief formed after a reasonable inquiry—well grounded in fact and warranted by existing law, a bad faith petition may run afoul of bankruptcy's version of Rule 11: Fed.R.Bankr.P. 9011. Indeed there is a panoply of weapons in a court's arsenal to deal with bad faith petitioners without depriving valid creditors of their statutory right to join the bankruptcy petition. *See In re Kidwell*, 158 B.R. 203, 216-19 (Bankr.E.D. Calif. 1993). Dismissing the petition would merely postpone the inevitable in an area where time is of the essence.

Finally, the bankruptcy court did not abuse its discretion in finding that Fetner generally failed to pay his debts as they became due. *See In re Concrete Pumping Service, Inc.*, 943 F.2d 627 (6th Cir. 1991). Therefore, we agree with the bankruptcy court that all of § 303(b)(2)'s requirements are satisfied and reject all of appellant's arguments to the contrary.

Accordingly, the judgment of the district court is hereby affirmed.

[Jan. 28, 1997]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-7244

PHILIP JAY FETNER,
Appellant

v.

STEWART H. HAGGERTY, Doctor, *et al.*,
Appellees

BEFORE: Edwards, Chief Judge, Silberman and Henderson, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed December 11, 1996, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

[Jan. 28, 1997]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-7244

PHILIP JAY FETNER,
Appellant

v.

STEWART H. HAGGERTY, Doctor, *et al.*,
Appellees

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Upon consideration of appellant's Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
MARK J. LANGER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judges Rogers and Tatel did not participate in this order.

[Filed Sep. 11, 1995]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PHILIP JAY FETNER,
Appellant,

v.

STEWART H. HAGGERTY, *et al.*,
Appellees.

MEMORANDUM AND OPINION

Before the Court is Philip Jay Fetner's ("Fetner") appeal of a decision of the United States Bankruptcy Court for the District of Columbia which *inter alia,* reinstated an involuntary petition against the debtor pursuant to 11 U.S.C. § 303(b)(2). This Court issued an Order on February 8, 1995 which narrowed the myriad of appellate issues raised by Fetner to the sole question of whether the Bankruptcy Court abused its discretion when it reinstated the involuntary petition for bankruptcy in its August 5, 1994 Opinion. *In re Philip Jay Fetner,* Case No. 92-01138 (Bankr. D.D.C. August 5, 1994). Upon consideration of the briefs filed by the parties, and the record as a whole, we find that the Bankruptcy Court did not abuse its discretion when it reinstated the involuntary petition for bankruptcy. For the reasons discussed below, the appeal is denied and the ruling of the Bankruptcy Court affirmed.

I. Background

This action commenced when an involuntary bankruptcy petition was filed against the Appellant on October 13, 1992, in United States Bankruptcy Court for the District of Columbia. Petitioners Stewart H. Haggerty, Johnson &

Hardin Co., and Claus Peter Arndt filed the initial petition for involuntary bankruptcy; George C. Schwelling was added to the petition by the Bankruptcy Court's Order filed January 7, 1993. Throughout this litigation the Bankruptcy Court has attempted to ascertain who has claims against Fetner.

The number of Fetner's creditors is important because if there are less than twelve holders of claims against the debtor only one holder's claims must be neither contingent as to liability nor subject to bona fide dispute for the Bankruptcy Court to reinstate the involuntary petition pursuant to 11 U.S.C. § 303. Of the four aforementioned petitioners, the District Court determined that the claim of Johnson & Hardin was not subject to a bona fide dispute. Order, Civ. No. 93-1341 (D.D.C. Feb. 14, 1994). Likewise the Bankruptcy Court granted Schwelling's motion for summary judgment, holding that his claim was not subject to a bona fide dispute. Order Granting Motion For Summary Judgment, Civ. No. 92-1138 (Bankr. D.D.C. April 20, 1993). However if the debtor has twelve or more creditors, the involuntary petition must be supported by three holders, with claims that are neither contingent nor subject to bona fide dispute.

During the course of the litigation the Bankruptcy Court presented Fetner several opportunities to provide information regarding his creditors. Appellant had a chance to provide a list of his creditors in 1993 during hearings on the involuntary petition. During those hearings Appellant chose not to establish that he had twelve or more creditors instead he only attempted to show that the petitioning creditor's claims were subject to a bona fide dispute.

At the Bankruptcy Court's discretion Appellant was presented another occasion to raise the issue that he had twelve or more creditors. The Bankruptcy Court issued an Order on June 16, 1994 directing the Appellant to file "a

list of all creditors with their addresses, a brief statement of the nature of each creditor's claim(s) (including whether Fetner maintains that the creditor's claim(s) are contingent or subject to a bona fide dispute), and the amounts thereof within 15 days from the entry of this order." *See* 11 U.S.C. §§ 105 and 303(b)(2). The record demonstrates that Appellant failed to comply with the Order.

On July 8, 1993 the Bankruptcy Court entered a show cause Order, instructing the Appellant to file a written response to show cause why the court ought not invoke its inherent power embodied in Fed. R. Bankr. P. 7016 to grant the involuntary petition pursuant to § 303(b)(2) in light of debtor's failure to comply with the court's June 16, 1994 Order.

Appellant filed a response to the show cause order on July 18, 1994. Appellant explained that he did not respond to the June 16, 1994 Order because he was "traveling in and out of the District extensively at this time, until late in the month of June." Additionally, he explained that he did not file a response because he was absent from the area during the July fourth holiday. However, Fetner's response did not provide a list of creditors as the Court requested, instead Fetner questioned the Bankruptcy Court's authority to enter the June 16, 1994 Order.

On August 5, 1994, the Bankruptcy Court rendered a decision which denied Appellant's motion for reconsideration of the June 16, 1994 Order and reinstated the involuntary petition for bankruptcy against the Debtor pursuant to 11 U.S.C. § 303(b)(2). *In re Philip Jay Fetner,* Case No. 92-01138 (Bankr. D.D.C. Aug. 5, 1994). Appellant argues that the Bankruptcy Court should be reversed because it made several mistakes of law and abused its discretion by granting the involuntary petition. The Court finds none of Fetner's contentions meritorious, and affirms the decision of the Bankruptcy Court.

II. Discussion

A. *Standard of Review*

Under Rule 1013 of the Bankruptcy Rules, the bankruptcy court "shall determine the issue of a contested petition at the earliest practicable time and forthwith enter an order of relief, dismiss the petition or enter any other appropriate order." Fed. R. Bankr. P. 1013. Where the petitioning creditors comply with 11 U.S.C. § 303, the statute "is completely unambiguous and resposes no discretion in [the bankruptcy court]. If the statutory standards are met the 'court shall order relief against the debtor.'" *In re Sago Palms Joint Venture*, 27 B.R. 33, 34 (Bankr. D. Fla. 1982); *see* 11 U.S.C. § 303.

This Court may reverse the Bankruptcy Court's grant of a relief order only if it abused its discretion by refusing to give the debtor further opportunity "to enlarge the record as to the § 303(b)(2) issue." A discretionary decision will be reversed only if it is "based on an erroneous conclusion of law or when the records contains no evidence on which [the trial court] rationally could have based that decision." *In re Windmill Farms, Inc.*, 841 F.2d 1467, 1472 (9th Cir. 1988) (internal quotes omitted).

Pursuant to Fed. R. Bankr. P. 9006(b), the court may grant a motion "made after the expiration of the specified period to permit the act to be done where the failure to act was the result of excusable neglect." A decision which contemplates excusable neglect is an equitable one which balances "all relevant circumstances surrounding the party's omission." *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 113 S.Ct. 1489, 1498 (1993).

B. *Analysis*

Pursuant to 11 U.S.C. § 303(b)(2), if a debtor has fewer than twelve creditors, the filing of a petition by a single creditor who holds a claim that is not subject to a

bona fide dispute is sufficient to sustain an involuntary bankruptcy. However, if the debtor has twelve or more creditors, a petition for involuntary bankruptcy must be supported by at least three petitioning creditors. 11 U.S.C. § 303.

Appellant argues that the issue as to the number of his creditors has been decided and subject to the doctrine of res judicata. The Appellant is both misguided and wrong in his interpretation of the Bankruptcy Court's earlier opinions. The Bankruptcy Court never issued a final judgment regarding the number of Fetner's creditors. The Court's May 18, 1993 decision merely highlighted the Appellant's failure to provide any evidence regarding the number of his creditor.[1]

Additionally, Appellant contends that the Bankruptcy Court made an error of law because it applied an inappropriate burden of proof. The Appellant's argument is without merit and based on a misunderstanding of the law. The Bankruptcy Court correctly explained that the "burden of raising the issue of the number of creditors to file a petition rests with the alleged debtor." *In re Copperstone Communications, Inc.*, 96 B.R. 233, 235 (Bankr. W.D. Mo. 1989); *In re Mason*, 709 F.2d 1313 (9th Cir. 1983).

> That the debtor has the burden of raising the issue of the number of creditors stands to the test of reason, since the alleged debtor is the only party with such knowledge and without intimate knowledge of the

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[1] In the Bankruptcy Court's May 18, 1993 opinion the court notes in a footnote that "there was no evidence that the debtor has fewer than 12 holders of claims not subject to a bona fide dispute." The Bankruptcy Court later explained that the "remark only indicates that the issue was not addressed at trial presumably because three petitioners allegedly holding non-contingent and undisputed claims joined the original petition." *In re Fetner*, Civ. No. 92-01138 at 2 (Bankr. D.D.C. August 5, 1994).

> alleged debtor's affairs the petitioner would have no way of knowing.

In re Copperstone, 96 B.R. at 236. By failing to present the number of creditors during the 1993 trial and failing to comply with the June 16, 1994 Order, Appellant has failed to carry his initial burden of production.

Additionally, a debtor's defense, that a defect in the three-petitioner requirement of 11 U.S.C. § 303 exists, is waived if not timely filed. *In re Mason*, 709 F.2d at 1318-19; *In re Earl's Tire Serv.*, 6 B.R. 1019, 1022 (D. Del. 1980). Thus, the debtor must raise the issue and failure to raise the defense or provide information as to the number of creditors will constitute a waiver. *See In re McIsaac*, 19 B.R. 391 (Bankr. D. Mass. 1982) (debtor waived any defense based upon existence of twelve or more creditors by initially failing to file a list of creditors and subsequently filing an incomplete and vague list).

It is clear from the record that the Bankruptcy Court did not err when it held that Appellant both waived his defense and failed to meet his burden of production with regards to the number of his creditors. Appellant had ample opportunities to provide information to the Court as to his creditors during the trial in 1993 and by responding to the June 16, 1994 Order. The Bankruptcy Court properly decided that Appellant failed to meet his burden of production and waived any defense regarding the number of his creditors.

Moreover, the Court justifiably refused to enlarge the time for Appellant to comply with the orders. Appellant's failure to comply with the Bankruptcy Court's orders frustrated the Court's ability to comply with Fed. R. Bankr. P. 1013(a), which requires that the court "shall determine the issues of a contested petition at the earliest practicable time and forthwith enter an order for relief, dismiss the petition or enter any other appropriate order." Here the record shows that the Bankruptcy Court considered:

> (1) the danger of prejudice to the debtor; (2) the length of delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith.

Pioneer Investment Services Co., 113 S.Ct. at 1498. The Bankruptcy Court properly exercised its discretion pursuant to Fed. R. Bankr. P. 9006(b) and 7016(f) when it refused to allow the Appellant additional time to present information regarding the number of his creditors. Therefore the Court concludes that the Bankruptcy Court acted within proper bounds of its discretion when it reinstated the involuntary petition for bankruptcy.

Accordingly, it is by the Court this 11th day of September, 1995,

ORDERED, that Fetner's Appeal is DENIED; and it is

FURTHER ORDERED that the Judgment of the Bankruptcy Court is AFFIRMED.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

[Filed & Entered Aug. 5, 1994]

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 92-01138
Involuntary
(Chapter 7)

IN RE PHILIP JAY FETNER,
Debtor.

DECISION DENYING MOTION FOR RECONSIDERATION OF JUNE 16, 1994 ORDER AND REINSTATING INVOLUNTARY PETITION PURSUANT TO 11 U.S.C. § 303(b)(2)

On June 16, 1994, this court entered an order requiring the debtor, Philip Jay Fetner, to file a list of all of his creditors within 15 days from the entry of the order such that the court could determine whether the involuntary petition filed against the debtor may be granted pursuant to 11 U.S.C. § 303(b)(2). The debtor failed to comply with this order. As a result of that failure, on July 8, 1994, this court entered a show cause order, instructing the debtor to file a written response to show cause why the court ought not invoke its inherent power pursuant to Fed. R. Bankr. P. 7016 to grant the involuntary petition pursuant to section 303(b)(2) in light of debtor's failure to comply with the court's order of June 16, 1994. On July 18, 1994, the debtor filed a pleading entitled Motion to Reconsider the Court's Order of June 16, 1994 and Debtor's Response to Order to Show Cause.

I

A party must move for reconsideration within a reasonable period of time from the entry of the order and the court finds that 30 days in this case is not reasonable. A

motion for reconsideration filed only after the court issued a show cause order upon the expiration of the debtor's time to comply is not timely.

II

In any event, the court finds the motion for reconsideration to be without merit. The order was and is a proper effort by this court to resolve the issues before it in an efficient manner. This involuntary petition has been pending and in dispute for almost two years. If there are less than 12 holders of claims against the debtor that are neither contingent as to liability nor subject to bona fide dispute, then the petition should be reinstated pursuant to section 303(b)(2), putting an end to this unresolved matter. Contrary to the debtor's assertion, this court has never determined whether 12 or more such creditors exist. In a decision dated May 18, 1993, dismissing the petition, the court noted in footnote 1 that "there was no evidence that the debtor has fewer than 12 holders of claims not subject to a bona fide dispute." This remark only indicates that the issue was not addressed at trial, presumably because three petitioners allegedly holding noncontingent and undisputed claims joined the original petition. Thus, throughout this proceeding, the court has merely assumed that three petitioners with undisputed and non-contingent claims were required. This was error. As discussed at the conclusion of this decision, the § 303(b)(2) issue was one on which the debtor had the initial burden of production. At the 1993 trial, the debtor only attempted to show that each of the petitioning creditors had claims that were the subject of bona fide dispute. Once the court determined that petitioner Schwelling had a claim not subject to bona fide dispute, the record required that the court grant an order for relief under § 303(b)(2) because the debtor wholly failed to carry his initial burden of production as to the applicability of § 303(b)(2). The court, of course, had the discretion to reopen the record to allow the debtor to show that § 303(b)(2) does not apply.

That was what the June 16, 1994 order was directed towards. Not seizing this opportunity to address an evidentiary shortfall in his defense at the 1993 trial, the debtor has chosen instead to take issue with the propriety of the June 16, 1994 order.

By entering the June 16, 1994 order, this court was not attempting to avoid the need to address what the debtor refers to as the "difficult issue of just what the remand means and what should be the extent of the issues tried. . . ." [1] The issue before the court is whether the involuntary petition ought to be granted pursuant to section 303(b). Resolution of this issue includes the determination of whether section 303(b)(2) is applicable to this proceeding. If the court can decide whether the involuntary petition ought to be granted without the need for a further trial, then the court will have conserved judicial (and the parties') resources—this court is not, as the debtor asserts, furthering a "quest for a magic bullet." The debtor has advanced no reason to hold a trial on the issues remaining unresolved after remand when the matter might be resolved upon the debtor's compliance with this court's order of June 16, 1994. Accordingly, the debtor's motion for reconsideration will be denied.

III

The issue that remains is what the court should do now that the debtor's motion to reconsider has been denied. The debtor has now had two shots at addressing the § 303(b)(2) issue: first, at the 1993 trial and, second, by way of reasonably promptly filing the § 303(b)(2) information elicited by the court's order requiring him to file a list of his creditors indicating which claims were non-contingent and not the subject of bona fide dispute. The court could have decided the § 303(b)(2) issue

[1] This court, in tandem with the entry of this decision and accompanying order, is also entering a decision regarding the issues on remand.

against him based upon the record developed at trial but gave the debtor a further opportunity to address it by complying with the June 16, 1994 order. As discussed below, the court declines to give the debtor any further opportunity to address the § 303(b)(2) issue. Accordingly, as required by the record developed in the 1993 trial of this involuntary petition, the court must rule in favor of the petitioners pursuant to 11 U.S.C. § 303(b)(2).

Under Fed. R. Bankr. P. 1013(a) the court "shall determine the issues of a contested petition at the earliest practicable time and forthwith enter an order for relief, dismiss the petition or enter any other appropriate order." The debtor's failure to file the information required by this court's order, even as late as this date, frustrates the court's ability to comply with Rule 1013(a). Accordingly, the court does not believe it should exercise its discretion to give the debtor any further opportunity to enlarge the record as to the § 303(b)(2) issue.

Moreover, as discussed below, even had this case not already been tried in 1993, the court would conclude in the exercise of its discretion that it should afford the debtor no further opportunity. For even if the issue were not one of whether to exercise the court's discretion to reopen the 1993 trial record to allow the debtor to present evidence on an issue he had wholly failed to address, the debtor has not shown he is entitled to a further opportunity to comply with the court's June 16, 1994 order.

IV

The debtor has implicitly asked this court for an enlargement of time to comply with this court's order in the event the motion for reconsideration is denied. Pursuant to Fed. R. Bankr. P. 9006(b), the court may grant a motion "made after the expiration of the specified period to permit the act to be done where the failure to act was the result of excusable neglect." The determination of

whether the debtor's failure to act was the result of excusable neglect is "an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Investment Services Co. v. Brunswick Associates L.P.*, 113 S.Ct. 1489, 1498 (1993). These circumstances include (1) the danger of prejudice to the debtor; (2) the length of delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. *Id.*

In this case, only one factor possibly weighs in favor of finding excusable neglect—the danger of prejudice to the debtor. If the court does not allow the debtor additional time to respond, the involuntary petition will be granted. But on this record, the debtor has not shown that he has the requisite 12 or more creditors with non-contingent and non-disputed claims.

The remaining factors weigh strongly against the debtor. The debtor has offered no explanation for the lengthy delay in filing the instant motion. Compliance with the order was due on July 1, 1994, yet the debtor filed no response until July 16, 1994. He was fully aware of the deadline and although the debtor explained that the court order "did not actually reach debtor, who was traveling in and out of the District extensively at this time, until late in the month of June," the debtor provides no reason for failing to file a response when he returned at the end of June. The debtor waited until over 18 days after his return to file a response and, then, only after this court had issued a show cause order. His explanation that he was absent from the area during the July 4th holidays does not justify such a lengthy delay. Even once he did respond, it was not to supply the required information but to pick a fight with the propriety of the court entering the order. At this late juncture, he has still failed to furnish the required information.

This court entered an order well within its powers pursuant to 11 U.S.C. §§ 105 and 303(b)(2) and Fed. R. Bankr. P. 1003(b) requiring specific action by the debtor. The debtor is not free to disregard the court's order simply because he disagrees with the order or, for personal reasons, finds it inconvenient to respond. And the debtor has not offered any other explanation for his failure to comply with the order. Even if the debtor believed that the court did not have the authority to enter such an order (an argument that this court finds to be without merit), the debtor was not free simply to disregard it. He should have sought reconsideration of the order in a timely fashion or filed some other appropriate response.

As to the issue of good faith, the debtor's conduct demonstrates a willful failure to comply. His delay in addressing the § 303(b)(2) issue can only work to the prejudice of the petitioners who would have to meet the debtor's evidence at trial. Moreover, it deprived them of the opportunity of seeking to add such creditors as petitioners. Had the debtor promptly filed his motion for reconsideration (and, implicitly, for an enlargement of time), his good faith might not be in question. The court possibly could have addressed the motion sufficiently earlier to keep this case on track. But the debtor waited for over 18 days after his return to this area in "late June" before filing his July 18 motion. The debtor's conduct was a knowing, calculated decision, and bespeaks bad faith.

Finally, the debtor's failure to comply with the order significantly prejudices the administration of this court. A trial is scheduled on the issues unresolved after remand for August 24, 1994. The debtor's failure timely to comply or even to comply at all by this late date has frustrated the ability of this court to comply with the command of Fed. R. Bankr. P. 1013(a) promptly to determine the issues in this case. This is one form of prejudice to court administration.

Moreover, this court intended for the debtor to have complied with the order in sufficient time to determine whether the trial would be needed. If a trial was not needed, then the court could use the time reserved for trial to hear other matters. Admittedly, prejudice to the court's administration would be minimal if the court could order the debtor to comply within a few days from the date of this decision—the court would have sufficient time to rule on the section 303(b)(2) issue and, if the trial is not needed, schedule new matters for the time reserved on August 24, 1994. However, in addition to filing the instant motion, the debtor filed a praecipe informing the court that he will be out of the D.C. area from July 16, 1994 to August 3, 1994, "and will be unable to respond to any time-sensitive matter filed during this period" and that he "will not have access to his mail during this hiatus." Thus, if the court were to grant an extension, the debtor would not be able to undertake complying until, at the earliest, after his reutrn on August 3, 1994. This does not afford the court time to address whether to keep the August 24, 1994, trial date in place or to use it for other matters. (Moreover, the judge presiding over this case will be out of the district on vacation from August 7, 1994 until August 18, 1994.) The court has numerous proceedings that require rulings and the court cannot devote its time only to the debtor's proceeding. Thus, debtor's delay has prejudiced this court's ability to control its docket and efficiently administer the proceedings before it.

Based on all the circumstances in this case, the court concludes that the debtor's failure to act in a timely manner was not the result of excusable neglect. Accordingly, the debtor's motion for an extension of time will be denied.

The only remaining issue, therefore, is the effect of the debtor's failure to comply with this court's order in this proceeding. The defense that there are 12 or more

creditors described in § 303(b)(1) may be waived. *In re Earl's Tire Serv.*, 6 B.R. 1019, 1022 (D. Del. 1980). Thus, the debtor must raise the issue and by failing timely to provide the information required by this court's order, has waived the defense in this case.

Moreover, this court is of the view that when the number of the debtor's creditors is at issue with respect to the validity of an involuntary petition, the initial burden of production on the issue of the number of creditors is appropriately placed with the debtor. *In re Martin,* 698 F.2d 883, 887 (7th Cir. 1983) (initial burden of production on any issue depends on the circumstances). *See also White v. McGuirl,* slip op., January 25, 1994, Bankr. D.D.C. at 7. Placing the burden of production on the debtor in this context is reasonable because it is the debtor who has knowledge of the information sought. *See In re Crabtree,* 39 B.R. 718, 725 (Bankr. E.D. Tenn. 1984) (court shifted burden of going forward to debtor upon debtor's failure to produce evidence in his exclusive possession or control). Moreover, when a petition is filed by fewer than three creditors and the number of the debtor's creditors is at issue pursuant to section 303, the burden is on the debtor to provide a list of all creditors, their addresses, and the amounts and nature of their claim. *See* Fed. R. Bankr. P. 1003(b); *In re Coppertone Communications, Inc.*, 96 B.R. 233, 234-35 (Bankr. W.D. Mo. 1989) (debtor has burden of raising issue of number of creditors and filing a list of those creditors once raised) and cases cited therein. Although the court in *In re James Plaza Joint Venture,* 67 B.R. 445, 448 (Bankr. S.D. Tex. 1986), held that it is the plaintiff's burden to demonstrate the number of creditors, the court presumably was referring to the ultimate burden of persuasion. If the court, however, was also referring to the initial burden of production, this court respectfully disagrees. Similarly, in *Atlas Mach. & Iron Works v. Bethlehem Steel,* 986 F.2d 709, 715-16 (4th Cir. 1993), the evidence

demonstrated the existence of 66 creditors and the court of appeals' decision addressed the burden of proof, not the burden of production issue.

By failing to comply with this court's order, the debtor has failed to carry his initial burden of production. Accordingly, the court must conclude that less than 12 creditors with non-contingent and undisputed claims exist. *Cf In re McIsaac,* 19 B.R. 391 (Bankr. D. Mass. 1982) (debtors waived any defense based upon existence of twelve or more creditors by initially failing to file a list of creditors and subsequently filing an incomplete, vague list). Accordingly, the court will order the petition reinstated pursuant to section 303, there being at least two petitioners, Schwelling and Johnson and Harding, that hold undisputed and non-contingent claims.

V

Even if the initial burden of production is not on the debtor, his failure to comply with the court's order warrants sanctions under Fed. R. Bankr. P. 7016. The appropriate sanction is to decide the § 303(b)(2) issue against him.

An appropriate order follows.

Dated: August 5, 1994

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

[Filed & Entered Aug. 5, 1994]

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 92-01138
(Chapter 7)

IN RE PHILIP JAY FETNER,
Debtor.

ORDER

In accordance with a decision of this date, it is hereby

ORDERED that the debtor's motion for reconsideration is DENIED. It is further

ORDERED that the order dismissing the involuntary petition is VACATED. It is further

ORDERED that an order for relief under Chapter 7 of the Bankruptcy Code is hereby entered pursuant to 11 U.S.C. § 303(b)(2).

Dated: August 5, 1994

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

[Filed & Entered Aug. 5, 1994]

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 92-01138
Involuntary
(Chapter 7)

IN RE PHILIP JAY FETNER,
Debtor.

SUPPLEMENTAL DECISION ON REMAND
REGARDING DEBTORS'S MOTION TO AMEND

This involuntary petition is before the court pursuant to a remand by the district court after a successful appeal by the petitioners in which the debtor filed no brief.

This court tried this matter on April 5, 1993. There were four petitioners: Arndt, Haggerty, Johnson & Harding, and Schwelling. In the court's oral opinion, the court ruled (1) that Haggerty, Johnson & Harding, and Schwelling were holders of claims described in 11 U.S.C. § 303 (b)(1) and (2) that under 11 U.S.C. § 303(h)(1) the debtor was not generally paying his debts as they came due. In a supplemental written decision entered April 20, 1993, the court additionally concluded that Arndt held a claim described in § 303(b)(1).

The court then granted the debtor's motion under F.R. Bankr. P. 7052(b) and 9023 to amend the judgment, entering a decision on May 18, 1993. The court reversed its findings that Johnson & Harding and Arndt held claims described in 11 U.S.C. § 303(b)(1) and ruled they did not. The court did not address anew the

question whether Haggerty held a claim described in § 303(b)(1) but observed that "there are at most only two qualified petitioners in this case," meaning Schwelling and Haggerty. (DE 53, May 18, 1993 Decision, p. 5.) The court thus did not decide whether the debtor's motion to amend should be granted as to the finding that Haggerty held a claim described in § 303(b)(1). The court similarly vacated as unnecessary to its decision its findings that Arndt had not proceeded in bad faith. The court, however, did expressly address Schwelling's claim and agreed that the claim was not the subject of a bona fide dispute and that summary judgment had been properly granted as to that claim. The court assumed that there were 12 or more holders of claim described in § 303(b)(1) such that three such holders were required for the petition to be pursued.

The petitioners appealed and the District Court reversed. First, it held that Johnson & Harding held a claim described in § 303(b)(1). Second, it held that as to Arndt this court had to apply a different test on remand. The District Court did not have a full trial transcript and, accordingly, could not necessarily review the Haggerty claim. Nor could the District Court assume that this court had found that Haggerty held a claim described in § 303(b)(1): this court had stopped short of addressing that issue on the debtor's motion to reconsider and is entitled to address the issue anew. Nor, in the absence of a trial transcript, could the district court decide whether there were 12 or more holders described in § 303(b)(1) such that Schwelling's and Johnson & Harding's claims would not entitle them alone to pursue the petition under § 303(b)(3) without the necessity of joining a third petitioner who is such a holder. The record is devoid of evidence on that issue and the court is free to assay whether, in that light, it properly assumed that there were 12 or more such holders.

Thus, on remand the court must treat Schwelling and Johnson and Harding as holding claims described in § 303 (b)(1) and, to the extent necessary, should:

(1) decide the debtor's motion to amend as to Haggerty;

(2) address Arndt's claim (unless the court decides that Haggerty's claim is one described in § 303 (b)(1) and thus a ruling as to Arndt's claim is unnecessary);

(3) address the bad faith issue; and

(4) determine whether it properly decided that § 303(b)(1) rather than § 303(b)(2) applies.

The court, by a separate decision of this date, has decided the fourth issue against the debtor based on noncompliance with an order of this court. That results in a granting of the petition. The court, however, had already undertaken its review of the other issues and this decision addresses them. Before addressing those remaining issues, the court takes pains to set forth the standard it is applying in hopes of avoiding any future uncertainty. As section 303(b)(1) makes clear, the holder of a claim that is in "bona fide dispute" does not qualify as a petitioner. Although the term "bona fide dispute" is not defined in the Code, five circuits have adopted substantially similar tests for determining the existence of a bona fide dispute. The Seventh, Tenth, and Eighth Circuit have stated that the proper standard requires the bankruptcy court to "determine whether there is an objective basis for either a factual or a legal dispute as to the validity of the debt." *In re Rimell*, 946 F.2d 1363, 1365 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 2275 (1992); *In re Bartmann*, 853 F.2d 1540, 1544 (10th Cir. 1988); *In re Busick*, 831 F.2d 745, 750 (7th Cir. 1987). The Third Circuit, relying upon *Busick*, has adopted the same test with a gloss—a bona fide dispute exists if there are "substantial factual and legal questions raised by the debtor" bearing on lia-

bility. *In re B.D.W. Associates Inc.*, 865 F.2d 65, 66-7 (3d Cir. 1989). Most recently, the Fourth Circuit, citing all the cases above, noted that the term "clearly entails some sort of meritorious, existing conflict." *Atlas Machine & Iron Works, Inc. v. Bethlehem Steel Corp.*, 986 F.2d 709, 715 (4th Cir. 1993). In setting forth the proper test, all the circuit courts have relied heavily upon the standard set forth in *In re Lough*, 57 B.R. 993, 997 (Bankr. E.D. Mich. 1986): "if there is either a genuine issue of material fact that bears upon the debtor's liability, or a meritorious contention as to the application of law to undisputed facts . . ." then the claim is subject to a bona fide dispute. Many lower courts have adopted the *Lough* standard. *See, e.g., In re Atwood*, 124 B.R. 402, 408 (S.D. Ga. 1991); *In re Norriss Bros. Lumber Co., Inc.*, 133 B.R. 599 (Bankr. N.D. Tex. 1991); *In re Leach*, 92 B.R. 483, 487 (Bankr. D. Kan. 1988); *In re Ramm Industries, Inc.*, 83 B.R. 815, 823 (Bankr. M.D. Fla. 1988).

When deciding whether there is a bona fide dispute, the court must not resolve any genuine issues of fact or law. *Rimell*, 946 F.2d at 1365; *Bartmann*, 853 F.2d at 1544. Rather the court is to simply ascertain whether a genuine or "bona fide" dispute exists. *Id.* However, the court is not completely prohibited from addressing the legal merits of the alleged dispute and conducting a limited analysis of the legal issues in order to ascertain whether an objective legal basis for the dispute exists. *Rimmell*, 946 F.2d at 1365 (citing *Busick*, 831 F.2d at 750).

The burden is on the petitioner to establish a *prima facie* case that no bona fide dispute exists. Once this is done, the burden then shifts to the debtor to present evidence demonstrating that such a dispute does exist. *Rimell*, 946 F.2d at 1365; *Bartmann*, 853 F.2d at 1544; *Atlas Machine*, 986 F.2d at 715, and cases cited therein. With this standard in mind, the court now addresses the Haggerty claim.

Haggerty Claim

At the trial held on April 5, 1993, petitioner introduced an attested to copy of a judgment index, showing a judgment entered on July 29, 1985, in favor of Stewart V. Haggerty and Martha Haggerty, against Philip J. Fetner in Case Number 81-01047 pending in the Court of Common Pleas of Bucks County, Pennsylvania. (Petitioner Ex. 3.) The following contentions were raised at trial by the debtor: (1) that Mr. Haggerty is the transferee of the claim that was previously held by Mr. and Mrs. Haggerty and that the petition failed to comply with Bankruptcy Rule 1003(a) which addresses petitioners who hold transferred claims; (2) that Mr. Haggerty could not pursue the judgment without Mrs. Haggerty and it has been established that she is not a petitioner; (3) that the claim is barred by the statute of limitations; and (4) that the Haggerty judgment may be void as a matter of constitutional law. (DE 129, April 5, 1993 trial, Tr. at 5, 21.)

The court rejected all four arguments. First, the court found:

> Mr. Haggerty was always the holder of a judgment, a claim against the debtor. The amount that belonged to him is irrelevant for purposes of the petition in this case. The fact that he was later transferred part of the judgment by Mrs. Haggerty at a later date is, in this Court's view, irrelevant because he is not relying upon the transfer to support his right to be a petitioner in this case. The dangers that Rule 1003 was designed to confront are not presented in this situation with respect to Mr. Haggerty as a petitioner.

(DE 82, April 5, 1993 oral decision, Tr. at 6.)[1] The court also noted that there was no evidence that the judg-

[1] Fed. R. Bankr. P. 1003(a) provides that "A transferor or transferee of a claim shall annex to the original and each copy of

ment was in favor of the Haggertys as tenants by the entirety and thus concludes that the judgment was a joint judgment in which Mr. Haggerty had an interest that he could pursue as a creditor in this case. (*Id.*) The court further noted that even if the claim had been held as tenants by the entirety, the debtor conceded that the Haggertys are divorced. As a consequence, the prior judgment in their favor would be held in common by them and Mr. Haggerty would have an undivided one-half interest in the claim and hence standing to sue as a creditor in the filing of the involuntary petition.

At trial, debtor relied upon 42 Pa. C.S.A. § 5525(5), which provides that "an action upon a judgment or decree of any court of the United States or of any state" must be commenced within four years, to show that enforcement of the Haggerty judgment was barred by the statute of limitations. The court noted, however, that notwithstanding this statute, 42 Pa. C.S.A. § 5529(a) provides that "An execution against personal property must be issued within 20 years after the entry of judgment upon which the execution is to be issued." Thus, the court concluded that Dr. Haggerty had a claim within the meaning of 11 U.S.C. § 101(5) by virtue of his right to execute upon the judgment which was not barred by any statute of limitations. (*Id.* at 7.)

Finally, the debtor claimed that the Haggerty judgment may be void as a matter of constitutional law. The court found:

> The Court has in front of it a certification of entry of a judgment and no proof that the judgment is in

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the petition a copy of all documents evidencing the transfer, whether transferred unconditionally, for security or otherwise, and a signed statement that the claim was not transferred for the purpose of commencing the case and setting forth the consideration for and terms of the transfer. An entity that has transferred or acquired a claim for the purpose of commencing a case for liquidation under Chapter 7 or for reorganization under Chapter 11 shall not be a qualified petitioner."

> any fashion void. The Court overrules the debtor's objection or his contention in this regard for lack of proof.

(*Id.* at 12.)

As described previously, on May 18, 1993, the court amended its original and supplemental decision, vacating the order of relief and dismissing the petition. However, the court at that time did not need to reach the debtor's arguments in the motion to amend with respect to the Haggerty claim. The court now considers those arguments.

The debor raised several issues in his motion to amend, many without merit. However, because the court finds one argument to have some merit, it will amend its previous ruling with respect to the Haggerty claim as described below. Debtor contends that the judgment would not be entitled to full faith and credit because it was obtained without notice to or service upon the debtor. The debtor is correct in asserting that even though the Haggerty judgment was final, that judgment can be collaterally attacked on the basis that the court entering that judgment lacked personal jurisdiction over the debtor. *See Practical Concepts v. Republic of Bolivia*, 811 F.2d 1543, 1547 (D.C. Cir. 1987); *Crouch v. Crouch*, 641 S.W.2d 86 (Mo. 1982); *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 318 F. Supp. 161 (E.D. Pa. 1970). *Cf. Hubbard v. Howell*, 607 P.2d 123 (N.M. 1980) (party attempting to challenge judgment did not allege lack of service of process). Thus, it appears that the debtor's contention raises a bona fide dispute. However, the debtor did not raise this defense prior to trial. Although he did raise several arguments with respect to the Haggerty claim in his motion to dismiss, he did not raise lack of service of process. Nor did he raise that defense in his answer to the involuntary petition. *See* Fed. R. Civ. P. 12 (b) and (h)(1); Fed. R. Bankr. P. 7012 and 1011(b).

At trial, debtor testified as follows:

> The one grounds that are recognized in every single state as grounds for collateral attack are due process grounds, of which jurisdictional [sic] is the one that normally comes up. But other forms of due process, infirmity and unconstitutionality is obviously one of those. That was the basis on which the Court overturned this confession of judgment procedure, without notice and so forth. You can attack, collaterally, a default judgment on the basis of due process . . .
>
> I've never received a phone call . . . or a letter from an attorney trying to collect on it, a letter or any notice from the Haggertys . . . I just never took any notice it [the judgment] because I had never received any papers on it and I just basically was unaware of it.

(DE 129, Tr. at 5, 21.) In his pretrial statement submitted after remand, the debtor refined this argument, alleging that the judgment would not be accorded full faith and credit in debtor's domicile and is subject to collateral attack because the court that entered the judgment lacked *in personam* jurisdiction over debtor and, therefore, entry of the judgment violated due process. (DE 116, Debtor's Pretrial Statement, p. 5.)

As a result of the debtor's failure to raise this defense prior to trial, petitioner Haggerty reasonably believed that the introduction of a certified record of the judgment would be sufficient. Thus, the petitioner should at a minimum now have the opportunity to address the debtor's contention regarding lack of service. If service was proper, then the judgment is entitled to full faith and credit in this court and is not subject to any bona fide dispute. Thus, Haggerty would be a valid petitioner and the bankruptcy petition should be reinstated. Accordingly, in the absence of a decision on some other dispositive issue mooting the issue, the court would hold a trial

on the limited issue of whether the debtor was properly served in the Haggerty proceeding. The court would also receive evidence and argument at that trial as to whether Mrs. Hagerty's share of the claim was transferred to Mr. Haggerty in compliance with Rule 1003(a) and, if not, whether the Haggerty's initially held the claim as tenants in common or tenants by the entirety. If the claim was held as tenants by the entirety, the Haggertys' divorce rendered the Haggertys tenants in common. Thus, in either event, Dr. Haggerty would have been eligible to file as a tenant in common. If, instead, they initially held as joint tenants, the issue is cloudier: the court would hear at trial argument concerning whether this precluded Dr. Haggerty from pursuing the petition alone.

ARNDT CLAIM

Petitioner Arndt's claim is based upon an unpaid promissory note for $40K plus 18% interest from June 12, 1990. (Pet. Ex. 1.) No payment has been made on that note which was due on or before January 5, 1991. In 1991, Arndt sued Fetner in D.C. Superior Court on the promissory note. The debtor answered, denying liability, and filed for setoff and a counterclaim alleging defamation, invasion of privacy, tortious interference with defendant's peace of mind, unjustifiable institution of administrative proceedings and malicious abuse of process, and violation of the Federal Fair Debt Collection Practices Act ("FFDCPA"). Debtor seeks $1,000,000 for actual and punitive damages and $1,000 statutory damages pursuant to the FFDCPA issue.

The District Court remanded the case to this court for the determination of "whether the debtor's legal position in this litigation was taken in good faith, and not for purposes of delay, and that his counterclaim has genuine and objectively determinable merits. . . ." The District Court's order appears to be based on case law describing the proper standard for determining whether the debtor's

assertion of a counterclaim makes the petitioning creditor's claim subject to a bona fide dispute. In general, while a counterclaim does not *per se* give rise to a bona fide dispute[2] courts have treated counterclaims as raising a bona fide dispute in some instances. *See In re Henry*, 52 B.R. 8 (Bankr. S.D. Ohio 1985) (a bona fide counterclaim that, if successful, would entirely off-set the liability on the petitioning creditor's claim raises a bona fide dispute). *See also In re Kreidler Import Corp.*, 4 B.R. 256, 259 (Bankr. D. Md. 1980) (where debtor's claim if successful would completely set off amount of creditor's claim and debtor's claim has a bona fide factual basis, counterclaim extinguishes petitioning creditor's claim for the purposes of filing an involuntary petition); *In re Tampa Chain Co., Inc.*, 35 B.R. 568, 577 (Bankr. S.D.N.Y. 1983) (paucity of showing by debtor as to merits of counterclaims affords no reason for vitiating claim of petitioning creditor); *Georgia Jewelers, Inc. v. Bolova Watch Co.*, 302 F.2d 362 (5th Cir. 1962) (counterclaims may be asserted by debtor to reduce dollar amount of claims or number of creditors below statutory minimum); *Harris v. Capehart-Farnsworth Corp.*, 225 F.2d 268 (8th Cir. 1955) (court should determine if alleged counterclaims have merit such that they would reduce or extinguish petitioning creditor's claims). *Cf. In re Drexler*, 56 B.R. 960, 969 (Bankr. S.D.N.Y. 1986) (counterclaim may affect the amount of petitioner's claim which is relevant to determining whether the $5000 minimum in section 303(b)(1) is satisfied and the analysis of section 303(h)(1) of generally not paying debts as

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[2] *See In re Norriss Bros. Lumber Co. Inc.*, 133 B.R. at 604 (mere assertion of a counterclaim does not make the claim *per se* subject to a bona fide dispute); *In re Onyx Telecommunications, Ltd.*, 60 B.R. 492, 495, 497-98 (Bankr. S.D.N.Y. 1985) ("mere existence of a state court action in which a debtor has interposed an answer generally denying the allegations of the complaint is not sufficient as a matter of law to raise a dispute to a *bona fide* dispute within the meaning of Code § 303(b)(1)").

they come due). A counterclaim may be treated as a plea of setoff raising a defense. *Wright v. McCann*, 122 A.2d 334 (D.C. 1956). If the setoff defense, if successful, would suffice to defeat the creditor's claim, and there is a bona fide dispute as to the defense, the creditor's claim must be treated as in bona fide dispute.

In *Henry*, the court observed that summary judgment was granted in favor of the petitioner in the state court litigation and thus the question of liability in the legal sense had been settled. However, notwithstanding that observation, the court noted, "[w]hat unsettles the matter as to each of these judgments, . . . , is that there exists a countervailing counterclaim which if adjudicated in favor of the debtor could entirely off-set these existing liabilities." *Id.* The court reasoned that because the liability would disappear if the debtor won on its bona fide claims in the state court litigation, the petitioning creditor's claim was subject to a bona fide dispute.

Although this court adopted *Henry* in its amended decision, as the District Court properly determined, this court did not apply the standard correctly, having failed to determine whether the debtor's counterclaim is bona fide, that is, whether it has genuine and objectively determinable merits. Thus, it must now do so.

The debtor has asserted the following counterclaims: (1) defamation; (2) invasion of privacy; (3) tortious interference with peace of mind; (4) unjustifiable institution of administrative process and malicious abuse of process; and (5) violation of the FFDCRA. (Debtor's Ex. D, Proposed Pre-Trial Statement in D.C. Superior Court.) Preliminarily, the court notes that the Superior Court litigation was only two days away from trial. Given this procedural posture, it is reasonable to infer that the debtor's counterclaims have some objectively determinable merit; if without merit, then the normal mechanisms of dismissal or summary judgment would have

prevented these claims from proceeding to trial. *Compare Drexler*, 56 B.R. at 969 (counterclaims found to be without value because those claims were struck with prejudice in district court action).[3]

In addition to the procedural posture of the litigation, the evidence and testimony presented at the trial on the involuntary petition supports a finding that the debtor's claims may have merit. Debtor's claims for invasion of privacy and defamation are based upon the same events. Debtor alleges that Arndt caused to be distributed on public and private property a handout that falsely accuses defendant of dishonesty, fraud, and unethical professional conduct and that the handout included personal, private and proprietary financial information. Debtor further alleges that Arndt released the same handout to a news organization as a press release. (Debtor Ex. D, Proposed Pre-Trial Statement in Superior Court.) A series of four documents relating to the sale of the note were admitted into evidence at trial. Exhibit I-1 is a press release. Exhibit I-2 is a notice of sale. Exhibit I-3 is entitled "Background Information Statement of Claus Peter Arndt." Exhibit I-4 is a photograph of the debtor along with information regarding the debtor's background.

Arndt does not dispute that the note was offered for sale outside of the University Club to the public. Arndt's

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[3] The debtor contends that the Superior Court's default judgment on his counterclaims establishes that those claims are bona fide. The court rejects this argument. Whether Arndt is a valid petitioner is determined at the time the petition was filed. *In re Atwood*, 124 B.R. 402, 406 (S.D. Ga. 1991) (generally court must count debtor's creditors as of the date of the petition); *Drexel*, 56 B.R. at 968 (court is to look to matters as they stood on date petition was filed); *In re Johnston Hawks, Ltd.*, 49 B.R. 823, 832 (Bankr. D. Haw. 1985) (same). *See also Bartmann*, 853 F.2d at 1544 (error for court to find that debt could not be subject to bona fide dispute on basis that debtor paid claim post-petition). The default judgment the debtor relies upon was not entered until after the involuntary petition was filed. It is not a final judgment and thus is irrelevant to the issue before the court.

daughter distributed Ex. I-2 along with a copy of the promissory note to passerbys at the University Club on July 1, 1991, during the lunch hour. The parties dispute, however, whether the other exhibits were also handed out to the public. Ms. Christine Dolan testified that Ex.'s I-2 and I-3 were being handed out, that Ex. I-1 was faxed to her, and that she was unsure whether Ex. I-4 was handed out or faxed to her. Mr. Fetner testified that all four exhibits were being handed out along with the promissory note. Mr. Basker has made conflicting representations with respect to which documents were handed out. At trial, he objected to the introduction of Exhibit I-1, I-3, and I-4 on the grounds that only Ex. I-2 was handed out to the public. However, in the pretrial statement filed after the district court's remand, he proposed as a stipulated fact that Ex. I-3 was handed out along with Ex. I-2 and the note. (DE 131, Pretrial Statement of Petitioner Claus Peter Arndt.) Notwithstanding this factual dispute, which this court must not resolve, the distribution of Ex. I-2 alone, objectively viewed, can reasonably be said to support a cause of action for invasion of privacy and/or defamation. Ex. I is forth in Appendix A.)

There are two types of invasion of privacy actions that are feasible in this case—public disclosure of private facts or publicity that places one in a false light in the public eye. To prevail upon a claim of unreasonable publicity to one's private life under District of Columbia law, the plaintiff must show publication of private facts in which the public has no legitimate concern, whose publication would cause suffering, shame or humiliation to a person of ordinary sensibilities. *White v. Fraternal Order of Police*, 909 F.2d 512, 517 (D.C. Cir. 1990); *Wolf v. Regardie*, 553 A.2d 1213 (D.C. App. 1989); *Vassiliades v. Garfinckel's, Brooks Brothers*, 492 A.2d 580 (D.C. App. 1985); *Dresbach v. Doubleday & Co., Inc.*, 518 F. Supp. 1285 (D.D.C. 1981). To prove the tort

of invasion of privacy by exposing one to false light publicity, the plaintiff must establish that: (1) the false light in which the person is placed would be highly offensive to a reasonable person; and (2) the actor had knowledge or reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. *White v. Fraternal Order of Police,* 909 F.2d 512 (D.C. Cir. 1990) (citing Restatement 2d of Torts § 625E (1977)).

This court is only to determine whether the debtor's counterclaims, objectively viewed, have merit such that they raise a bona fide dispute. This court is not to decide any dispute that is found to exist. Based on the actions admittedly taken by Arndt and having reviewed the content of the document distributed (as well as those alleged to have been distributed), the court finds that the debtor's claim for invasion of privacy is a bona fide claim. The actions taken by Arndt could reasonably be viewed as an attempt by a creditor to force payment of a debt by subjecting the debtor to public contempt, insult or ridicule which has been held to state a cause of action for invasion of privacy. *See, e.g., Mason v. Williams Discount Center, Inc.,* 639 S.W.2d 836 (Mo. Ct. App. 1982) (complaint alleging that store included customer's name on list of names posted in store under heading "no checks" stated cause of action for invasion of privacy); *Tollefson v. Price,* 430 P.2d 990 (Or. 1967) (complaint stated cause of action where defendant posted in store, then later in newspaper, a document that offered for sale to the highest bidder certain notes owed by plaintiffs); *Trammel v. Citizens News Co.,* 148 S.W.2d 708 (Ky. 1941) (notice published in newspaper stated plaintiff owed defendant creditor money and requested plaintiff to inform him if there was any error; prior to publication, creditor threatened to publish notice if account was not paid; court held that even though plaintiff admitted owing

amount stated in the notice, publication was invasion of privacy).[4]

The debtor's claim for defamation also has merit.[5] When addressing an action for defamation, this court must first determine whether the documents handed out in this case are capable of conveying a defamatory meaning. *White,* 909 F.2d at 518. In doing so, District of Columbia law limits the court's power to determine whether a statement is not defamatory as a matter of law: "It is only when the court can say that the publication is not reasonably capable of any defamatory meaning and cannot be reasonably understood in any defamatory sense that it can rule as a matter of law, that it was not libelous." *Id.* (quoting *Levy v. American Mutual Ins. Co.,* 196 A.2d 475, 476 (D.C. 1964)). In general, a publication may convey a defamatory meaning if "it tends to lower [the] plaintiff in the estimation of a substantial, respectable group, though they are a minority of the total community or plaintiff's associates." *Id.* (quoting *Afro-American Publishing Co. v. Jaffe,* 366 F.2d 649, 654 n.10 (D.C. Cir. 1966)). Upon finding that a publication is capable of bearing a defamatory meaning, it is for the jury to determine whether that meaning was attributed in fact. *Id.* The court in *White* also held that a communication will be deemed capable of bearing a defamatory meaning if the particular manner or language in which the facts are conveyed suggests that the defendant intends or endorses the defamatory inference that can be drawn from the statements. *Id.*

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[4] There is a genuine dispute over whether the statements in the documents were true or false. If true, then only publication of private facts would provide a basis for an action for invasion of privacy.

[5] The false light invasion of privacy action is different from defamation because a defamation tort redresses damage to reputation while a false light privacy action redresses mental distress from having been exposed to public view. *White,* 909 F.2d at 518. Yet truth is a defense to both actions. *Id.*

This court cannot find that the documents that form the basis of the debtor's defamation action are not reasonably capable of any defamatory meaning. It is reasonable to conclude that the statements contained in Exhibit I-2 are capable of defamatory meaning in that they could possibly lower the plaintiff's reputation among, at a minimum, the members of the University Club with whom the debtor was associated. Moreover, it is plausible to conclude that the manner in which those documents were conveyed suggests that Arndt endorsed the defamatory inference that could be reasonably drawn from those documents. Accordingly, debtor's defamation claim has objectively determinable merits.

Having found that these tort actions may have merit,[6] the court finds it unnecessary to further consider the remainder of the debtor's counterclaims. *Cf. Drexler,* 56 B.R. at 970 (court rejected debtor's reliance on counterclaims where resolution could not be determined without unduly delaying decision on petition). It is plausible that either the invasion of privacy action or the defamation action will result in an award of damages that offsets the amount owed to Arndt pursuant to the note. Although this court does not have any evidence regarding the damages alleged to have been suffered by the debtor, viewing the evidence presented at trial with respect to the actions of Arndt, it is not unreasonable to conclude that an award of $40,000 might result, thus extinguishing Arndt's claim.

Accordingly, the court concludes that the counterclaims asserted by the debtor are genuine and have objectively determinable merits. However, the District Court further instructed this court to determine "whether the debtor's legal position in this litigation is taken in

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[6] This court is in no way deciding the ultimate outcome of the debtor's counterclaims.

good faith, and not for the purpose of delay."[7] This court finds that the debtor's position in this litigation has been in good faith. There is no indication that the debtor has relied upon the counterclaims for the purpose of delaying this proceeding or has otherwise asserted those claims in bad faith. He had been pursuing those claims in the Superior Court litigation and was only two days away from trial. The debtor raised the counterclaims in this litigation as a means of establishing that petitioner Arndt's claim was subject to a bona fide dispute. His reliance on these counterclaims was a reasonable attempt to defend against the involuntary petition.

Accordingly, the court finds that Arndt's claim is subject to a bona fide dispute and thus he is unable to act as a petitioning creditor.

Bad Faith

The defense of bad faith usually applies when less than three eligible petitioners are pursuing the petition and the debtor seeks to block an amendment of the petition to add additional creditors. *See, e.g., Basin Electric Power Cooperative v. Midwest Processing Co.*, 769 F.2d

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[7] The language may be based upon Arndt's contention asserted in his brief submitted to the District Court that the analysis of whether a counterclaim raises a bona fide dispute includes the question of whether the debtor has raised in good faith the counterclaim as a defense to the petition. This court has found only one case suggesting that this is a proper factor, *In re Johnston Hawks, Ltd.*, 49 B.R. 823, 831 (Bankr. D. Haw. 1985), and the majority of courts since that decision have declined to follow *Johnston*'s approach. *See, e.g., Lough*, 57 B.R. at 996-97 (criticizing this approach); *Drexler*, 63 B.R. at 960 (finding rule in *Johnston* to be unsatisfactory); *Bartmann*, 853 F.2d at 1544 (debtor's subjective intent does not control whether claim is subject to bona fide dispute). However, this court, in compliance with the district court's order, will apply the plain meaning of the language set forth therein.

483 (8th Cir. 1985) (subsequent intervention disallowed where original petitioning creditor acted in bad faith). Here, the debtor did not object to the motion to amend the petition to add Schwelling and the court will not allow the debtor to object to Schwelling's addition as a petitioner at this late date. Schwelling has relied upon the court's decision (and the debtor's failure to object) by incurring fees in pursuit of this petition. He ought not be deprived of his legitimate expectations given these circumstances. Pursuant to § 303(c), Schwelling is treated as a petitioning creditor as of the filing date.

Schwelling is not related to Arndt and cannot be tarred with whatever ulterior motives Arndt had in filing the petition. Thus, assuming Haggerty is a valid petitioner, there are three eligible petitioners to whom this court cannot proscribe bad faith given the facts of this case. These petitioners were legitimately pursuing a statutory right: that the filing coincided with another possible advantage to Arndt, delay of a pending trial of Arndt's suit against Fetner, does not alter the court's conclusion. The court notes, however, that if Haggerty's claim is found to be disputed such that there are not three eligible creditors (and the petition is not reinstated), and if § 303(b)(1) applies, then bad faith does become an issue because the denial of the petition subjects Arndt to punitive damages under 11 U.S.C. § 303(i)(2) if it is determined that he filed the invalid petition in bad faith.[8] (However, by separate decision the court has determined that § 303(b)(1) does not apply.)

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[8] The court notes, however, that this court's denial of the debtor's previous § 303(i) motion for lack of prosecution bars any claim for damages incurred up to the date of the hearing on that motion. The court is uncertain whether that denial would also bar the debtor from seeking any damages incurred after that date and will address that issue if and when it arises.

CONCLUSION

Given this court's finding that Arndt is not a valid petitioner if § 303(b)(2) did not apply here, the court would schedule a trial on the limited issues of (1) whether the debtor was properly served in the Haggerty proceeding on which the judgment was based and (2) whether Mr. Haggerty is a proper transferee under Rule 1003 of Mrs. Haggerty's claim and, if not, whether Mr. Haggerty initially held the claim jointly with Mrs. Haggerty, and if the claim was jointly owned whether this precludes him from being a petitioner by himself. However, no trial is necessary given this court's separate ruling today that § 303(b)(2) applies.

Dated: August 5, 1994.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

[Filed & Entered Jun. 16, 1994]

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 92-01138
(Chapter 7)

IN RE PHILIP JAY FETNER,
Debtor.

ORDER

It having been determined that two of the four petitioners (Schwelling and Johnson & Hardin)[1] in this case are holders of claims as described in 11 U.S.C. § 303 (b)(1), it appears to the court that the involuntary petition may be granted pursuant to 11 U.S.C. § 303(b)(2) if there are fewer than 12 holders of a claim against the debtor that is not contingent as to liability or the subject of a bona fide dispute. In the event that there are less than 12 such holders, § 303(b)(2) provides that an involuntary case can be commenced by one or more of such holders. Accordingly, pursuant to 11 U.S.C. § 105 and Fed. R. Bankr. P. 1003(b), it is hereby

ORDERED that the debtor, Philip Jay Fetner, is to file a list of all creditors with their addresses, a brief statement of the nature of each creditor's claim(s) (including whether Fetner maintains that the creditor's claim(s) are contingent or subject to a bona fide dispute),

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[1] This court granted summary judgment with respect to Schwelling's claim and that decision has not been reversed on appeal. The district court, in an order entered on February 14, 1994, determined that the claim of Johnson & Hardin was not subject to a bona fide dispute.

and the amounts thereof within 15 days from the entry of this order.

Dated: June 15, 1994.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

[Filed Feb. 14, 1994]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 93-1341

CLAUS PETER ARNDT, *et al.*,
Appellants,

v.

PHILIP JAY FETNER,
Appellee.

ORDER

Upon consideration of appellant's brief, the failure of the appellee to file a reply brief, and the entire record herein, it appearing to the Court that the Ohio state court judgment in favor of Johnson & Harding is not subject to *bona fide* dispute, and further that the mere assertion of a counterclaim by the debtor does not raise a *bona fide* dispute, it is, this 14th day of February, 1994,

ORDERED, that the appeal is granted; and it is

FURTHER ORDERED, that this case is remanded to the bankruptcy court for a determination as to whether the debtor's legal position in this litigation is taken in good faith, and not for purposes of delay, and that his counterclaim has genuine and objectively determinable merits, failing which the involuntary bankruptcy petition shall be reinstated.

/s/ Thomas Penfield Jackson
THOMAS PENFIELD JACKSON
U.S. District Judge

[Filed & Entered May 18, 1993]

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 92-01138
(Chapter 7)

IN RE PHILIP JAY FETNER,
Debtor.

DECISION REGARDING DEBTOR'S MOTION UNDER RULE 7052(b) AND RULE 9023 AND DEBTOR'S RENEWED AND AMENDED MOTION UNDER RULE 7052(b) AND RULE 9023

On April 20, 1993, this court entered an Order for Relief under Chapter 7 pursuant to an oral decision of April 5, 1993 as supplemented by a written decision of April 19, 1993. In the interval between the court's oral decision and its written decision, the debtor filed a Motion Pursuant to Rule 8002(b) for Amendment of the Judgment under Rule 7052(b) and Rule 9023 and for New Trial under Rule 9023. Nine days after entry of the Order for Relief under Chapter 7, the debtor filed on April 29, 1993 a Renewed and Amended Motion by Debtor under Rule 7052(b) and Rule 9023. The petitioners Arndt, Haggerty and Johnson & Hardin Company have filed an opposition to the debtor's motions as has the petitioner Schwelling. Schwelling's opposition correctly observes that Schwelling's claim was not the subject of a bona fide dispute and that summary judgment was properly granted on this issue. The opposition filed by the other three petitioners is largely conclusory and inflammatory and of little assistance to the court in addressing the issues the debtor raises. For the reasons that follow, the

court concludes that the debtor's motion, as renewed, should be granted.

Many of the debtor's arguments are without merit. However, the court is persuaded that two of his arguments require the court to vacate its prior order granting relief and instead to enter an order dismissing the petition.

I

First, the debtor cites *In re Henry*, 52 B.R. 8 (Bankr. S.D. Ohio 1985), for the proposition that a *bona fide* counterclaim that, if successful, could entirely offset the debtor's liability to a petitioning creditor results in the creditor's claim being in *bona fide* dispute. Thus, urges the debtor, Arndt's claim is in *bona fide* dispute. The court is persuaded to follow *Henry*. This court had previously placed Arndt's claim and the debtor's counterclaim in separate compartments: there would be a right of setoff if Arndt had a *bona fide* claim and the debtor had a *bona fide* counterclaim, but the *bona fide* character of one claim, it was thought, would not affect the *bona fide* character of the other claim. This was error. Under 11 U.S.C. § 101(5) the term "claim" means "right to payment, whether or not such right is [inter alia] matured, unmatured, disputed, [or] undisputed." The right to payment might be disputed by means of assertion of a right of setoff.

II

The second contention that the debtor raises concerns the judgment in favor of Johnson & Hardin Company. This court ruled initially that the judgment in favor of Johnson & Hardin was entitled to full faith and credit as the judgment of a state court. The court expressed its doubts that a default judgment rendered one day after a dismissal for lack of prosecution would be held ineffective, in contrast to *Witty v. Rose*, 148 S.W. 2d 962 (Tex. Cir. App. 1941), in which there was a long interval between dismissal and entry of a second judgment. Finally,

the court placed the burden on the debtor to show that there had not been an order vacating the order of dismissal.

On reconsideration, the court is persuaded that the question of full faith and credit is irrelevant here. The debtor is entitled to show that the judgment in favor of Johnson & Hardin is the subject of a *bona fide* dispute. That Johnson & Hardin might be able to register its judgment in this district and obtain enforcement of that judgment under the full faith and credit clause is irrelevant. What counts is whether the debtor has shown that he has a *bona fide* basis for contesting the legitimacy of the subject judgment. Although this court felt that the rule of *Witty* would not be applied to a judgment entered the day after an order of dismissal, the issue is not beyond debate. The debtor correctly observes that how this court would decide the underlying merits of his contentions against the validity of the Ohio judgment is not at stake. Instead, at issue is whether he has a *bona fide* legal position that he is entitled to advance in the Ohio courts. The debtor has met that standard.

Next, once the full faith and credit clause is put aside as irrelevant, the petitioners are reduced to an ordinary burden of proving that the underlying debt is not in *bona fide* dispute. In his motion to dismiss the involuntary petition, the debtor promptly raised the order of dismissal as a defense to the status of Johnson & Hardin as a petitioner. At trial, this court placed the burden on the debtor to show that the order of dismissal had not been vacated. After further reflection, I think that was error. The debtor put on evidence of the entry of a dismissal order and there was no showing that he was aware of any order vacating that order of dismissal. The evidence showed a dismissal followed by a judgment in favor of Johnson & Hardin with no showing of any intervening act. Although the dismissal order could be defeated by showing that there had been an order vacating it, the evidence presented permits only one finding: that there was a

dismissal followed by the second judgment. It is not as though the debtor showed up at trial for the first time with a dismissal order and caught the other side unprepared to meet his defense. Here the debtor clearly gave notice that he was relying upon the dismissal order and gave the petitioners adequate opportunity to prepare to meet that defense by showing that the dismissal order had been vacated.

Finally, this court drew an inference in its written decision that the debtor did not contest the liability because he allowed a default judgment to be rendered against him. Once the judgment is shown to be in *bona fide* dispute, the burden shifts to the petitioner to show that there is no *bona fide* dispute as to the underlying liability itself. The only evidence that the court received in this case was the judgment itself. The underlying judgment itself is in dispute and, accordingly, cannot be accorded status as evidence of the debtor having actually been in default. Johnson & Hardin presented no other evidence upon which this court could infer that there was no *bona fide* dispute as to the underlying liability itself. Accordingly, the debtor had no burden of showing that he in fact denied the existence of liability.

III

Because there are at most only two qualified petitioners in this case, the petition must be dismissed.[1] The debtor requests this court to revisit the question of bad faith on the part of the petitioners. The issue of bad faith as a defense by the petitioner need not be addressed because the petition is being dismissed on other grounds. Similarly, the issue would have been relevant, if timely raised, to the question of Schwelling being added as a petitioner but that issue is now moot. Any prior findings and con-

[1] There was no evidence that the debtor has fewer than 12 holders of claims not subject to *bona fide* dispute.

clusions regarding bad faith are thus simply vacated as being unnecessary to the court's decision.

Dated: May 17, 1993.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

[Filed & Entered May 18, 1993]

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 92-01138
(Chapter 7)

IN RE PHILIP JAY FETNER,
Debtor.

ORDER VACATING ORDER FOR RELIEF
AND DENYING AND DISMISSING
INVOLUNTARY PETITION

In accordance with a decision of this date, addressing the debtor's motions under Rules 7052(b) and 9023, it is

ORDERED that the Order for Relief Under Chapter 7 dated April 19, 1993 and entered April 20, 1993 is VACATED. It is further

ORDERED that the involuntary petition is DENIED and DISMISSED, with the debtor allowed costs against the petitioner Arndt. It is further

ORDERED that the clerk may treat the pending notice of appeal, filed by the debtor, as a nullity. It is further

ORDERED that any bill of costs and any motion for sanctions shall be filed within 15 days of entry of this order.

Dated: May 17, 1993.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

STATUTE AND RULE

§ 303. Involuntary cases.

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—

(1) by three or more entities each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least $5,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $5,000 of such claims;

* * * *

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

(d) The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to a petition under this section.

* * * *

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed. Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if—

(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute; or

(2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment—

(1) against the petitioners and in favor of the debtor for—

(A) costs; or

(B) a reasonable attorney's fee; or

(2) against any petitioner that filed the petition in bad faith, for—

(A) any damages proximately caused by such filing; or

(B) punitive damages.

* * * *

Rule 7016. Pre-Trial Procedure; Formulating Issues.

Rule 16 FR Civ. P. applies in adversary proceedings.

Rule 16. Pretrial Conferences; Scheduling; Management.

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation, and;

(5) facilitating the settlement of the case.

(b) Scheduling And Planning. Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enters a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file and hear motions; and

(3) to complete discovery.

The scheduling order also may include

(4) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(5) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by direct court rule upon a showing of good cause.

(c) Subjects To Be Discussed At Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6) the advisability of referring matters to a magistrate or master;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for such party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(d) Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a sched-

uling or pretrial conference, or if a party or party's attorneys is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party, or both, to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.